(1)

91-916

No. _____

In The

Supreme Court of the United States

October Term, 1991

STEVEN FLETCHER COCHRAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. WHETHER THE EVIDENCE SEIZED FROM DEFENDANT'S CAR MUST BE SUPPRESSED WHERE THE OFFICERS LACKED AN ADEQUATE QUANTUM OF CAUSE TO SUSTAIN AN INVESTIGATORY STOP AND INSTEAD: [1] IMPROPERLY SUBSTITUTED AN ADMINISTRATIVE FORFEITURE SEIZURE AS AN OSTENSIBLE JUSTIFICATION FOR THE STOP; AND [2] RELIED ON A TENUOUS SEIZURE INCIDENT TO THE EXECUTION OF A WARRANT FOR THE SEARCH OF DEFENDANT'S HOME TO EFFECT THE STOP.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Steven F. Cochran respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Sixth Circuit Court of Appeals entered in this proceeding on July 17, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals For the Sixth Circuit is reported *sub nom. United States of America v. Steven Cochran* ___ F.2d ___, *reh'g den'd.* ___ F.2d ___, (6th Cir. 1991) and is reprinted in the Appendix hereto at 1.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on July 17, 1991. A timely motion for rehearing was denied on September 6, 1991. App. 37.

The jurisdiction of this Court to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States.

INTRODUCTION

On July 17, 1991, a panel of the Sixth Circuit Court of Appeals affirmed appellant's conviction with Judge Wellford filing a dissenting opinion (*U.S.A. v Cochran* slip opinion – Attachment A). Appellant, Steven Cochran, filed a petition for rehearing and suggestion for rehearing *en banc* of the majority panel decision affirming his conviction for possession of an unregistered firearm not identified by a serial number in violation of 26 U.S.C. § 5861(d). The petition was denied on September 6, 1991.

STATEMENT OF THE CASE

A hearing concerning the February 23, 1990 seizure was held on June 26, 1990. Gerald Bernacki testified that he was employed as an officer for the Detroit Police Department and that he was assigned to the Great Lakes Organized Crime Drug Enforcement Administration and the Bureau of Alcohol, Firearms and Tobacco (App. 13-16). Officer Bernacki testified that as part of his investigation of a drug "organization" he conducted surveillance on Mr. Cochran (App. 13-16). Officer Bernacki stated that he received information that Mr. Cochran supplied the organization with narcotics (App. 19-20). He began to survey Mr. Cochran's residence on Aspen Ridge Boulevard in Bloomfield Hills.

On February 21, 1990 Officer Bernacki observed Mr. Cochran walk from his condominium to his car wearing a leather coat with a zipper (App. 21-25). Mr. Cochran's hand was allegedly under the coat. The officer claimed that Mr. Cochran took a brown package from under his coat and placed it in the trunk of a 1986 Volvo (App. 21-25). The officer testified that the package was similar to others he had seen in the narcotics trade and that those packages always contained kilo quantities of narcotics (App. 21-25). He described the object as a 10 to 11 inch rectangular package approximately 4 to 5 inches thick (App. 21-25). Officer Bernacki testified that Mr. Cochran closed the trunk, started the car and proceeded, with the officer following, to an address on Avon Street in Detroit (App. 25-29). The officer stated that a gentleman named George Reid lived at the Avon address (App. 25-29).

The officer obtained a warrant for Mr. Cochran's house on February 23, 1990. He obtained documentation of Mr. Cochran's criminal history and learned that he had previously been arrested for firearms violations (App. 30-33). One arrest involved the same vehicle and was occupied by Mr. Cochran and George Reid (App. 30-33). Officer Bernacki explained that because of Mr. Cochran's criminal history he waited until he left the house before he confronted him (App. 34). The officer stated that he first saw Mr. Cochran on February 23, 1990 as he drove southbound leaving his residence (App. 34-35). Mr. Cochran was then stopped by a cadre of DEA and AFT agents. After being informed that the officers had a federal search warrant for the home Mr. Cochran was driven back to the home and "allowed" to open the door (App. 34-35). According to Officer Bernacki, Mr. Cochran agreed to admit them to the house. The officer further explained that in addition to Mr. Cochran's criminal history, the fact that a Doberman Pinscher resided in the house influenced the officers to wait until he left to seize him and then execute the search warrant (App. 34-35).

On cross-examination Officer Bernacki claimed that in the hundreds of cases he handled these rectangular shaped packages never contained anything other than narcotics (App. 36). He further stated that they never searched the Avon address to confirm his suspicion regarding the package's contents. He stated that Mr. Cochran and everyone else left the Avon residence within ten minutes of his arrival (App. 39-41).

Officer Bernacki admitted that the search warrant he obtained for the Aspen Ridge address did not include the car in the driveway (App. 42-43). He was suspicious that

criminal activity was involved but had no specific information with respect to what was in the car. He further admitted that Defendant did not violate any traffic laws before he was stopped.

Mr. Cochran was handcuffed at the scene of the stop and driven back to his residence. He was only uncuffed to permit him to unlock the door (App. 44-47). Officer Bernacki stated that the plan was to have Mr. Cochran remain outside of the house while the search warrant was executed (App. 44-47).

On redirect examination he testified that he was aware that the DEA planned to seize the Volvo for forfeiture related to an alleged narcotics transaction (App. 51-52). A search warrant was obtained for the Worldwide Market in Detroit, where the officer had followed Mr. Cochran on several occasions. After a delay of apparently approximately two months a warrant was secured for the Avon address. The officer believed that the Worldwide Market was one of the locations from which Mr. Cochran distributed narcotics (App. 52-53). No evidence was introduced that narcotics were seized at the Worldwide Market. He further explained that the garage was within the Aspen Ridge condominium (App. 53-54).

Biernacki further admitted that they did not seek a search warrant or judicial forfeiture for the car. Instead, they were proceeding to administratively seize it for forfeiture (App. 60-64). He ultimately admitted that the search of Mr. Cochran's home did not produce any narcotics (App. 67).

Richard Crock, Special Agent for the DEA, claimed that Mr. Reid was a major narcotics trafficker for the

organization (App. 70). Crock testified that they went to the Aspen address as part of a team assembled to detain Mr. Cochran when he left the house and to seize the vehicle in an "Administrative DEA forfeiture proceeding" (App. 70). He described the DEA procedure as follows: "whenever probable cause exists, to seize a vehicle that has been utilized in violation of the Controlled Substances Act, we seize the vehicle" (App. 73-75). According to Agent Crock, the owner is routinely notified of the seizure by the DEA, but in this case Mr. Cochran refused to sign the notification after he was seized driving down the street (App. 73-75). Agent Crock testified that after seizure, the vehicle is inventoried as are all containers (App. 76-78).

After Mr. Cochran was stopped the passenger compartment was searched for weapons. No weapons were obtained but the glove compartment contained a 9mm ammunition clip (App. 78-79). The car was seized and a subsequent search of the trunk several days later revealed a weapon.

On cross-examination Agent Crock admitted that no search warrant for the Avon address was issued at least until April of 1990 (App. 82-84). He further explained that the stop was effected with the officers' guns drawn (App. 88). The agent explained that he was aware of "debriefings" by a confidential informant regarding Mr. Cochran's involvement in the narcotics trade (App. 90). The informant himself was involved in narcotics trafficking (App. 92-93).

On June 27, 1990 oral arguments on the motion to suppress the evidence seized on February 23, 1990 were

held and the trial judge took the matter under advisement (App. 124-148).

On June 29, 1990 over defense counsel's objection the trial judge permitted the Assistant United States Attorney to reopen the proofs and present statements which allegedly had just come to her attention (App. 149-150). Special Agent Thomas Brandon of the Bureau of Alcohol, Firearms and Tobacco then testified that as they approached the Volvo, Agent Schmidt went to the driver's side and told Mr. Cochran to get out (App. 100-102). Brandon stated that he saw Mr. Cochran's right arm move and that Schmidt opened the door and again ordered Defendant to get out (App. 100-102). Brandon stated that he again saw Mr. Cochran's arm move faster (App. 100-102), Agent Schmidt then grabbed Mr. Cochran and pulled him out of the car (App. 101-102). Agent Brandon opened the glove box and out tumbled a 9mm magazine (App. 101-102). Mr. Cochran was taken to the back of the car which started to roll. Agent Brandon leaned over and secured the transmission in park (App. 101-102). Mr. Cochran was searched and pronounced unarmed (App. 101-102).

On cross-examination Agent Brandon denied that he stopped Mr. Cochran because he was going to seize the car. He stated that he acted pursuant to the federal search warrant for the house and out of a concern for the officers' safety (App. 112-115).

The trial court concluded that the stop of Mr. Cochran's vehicle was permissible under *Terry v. Ohio,* and *Michigan v. Summers* (App. 155-161). Based on Officer Bernacki's observation of Mr. Cochran as he placed a

package in the trunk and his subsequent trip to the Avon address, the court held that probable cause existed to seize the car for forfeiture (App. 155-161). The court held that once Mr. Cochran was stopped the officer was justified in searching the passenger compartment including the glove box (App. 155-161).

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

The majority opinion endorsed the exercise of broad power to search and seize individuals which extends beyond that authorized by the Supreme Court in *Michigan v. Summers* 452 U.S. 692 (1981). The decision similarly invites law enforcement to seize vehicles under the forfeiture statue where no probable cause exists.

There is no question that government agents strongly believed that Mr. Cochran was a major supplier of narcotics. The record is filled with innuendo but no substantial evidence of such activity. It is clear that the agents were desperate to confirm their suspicion and extensively surveilled Mr. Cochran's activities. In the end they were unable to discover facts which established probable cause or reasonable suspicion.

Nevertheless, a warrant was obtained and a search of Mr. Cochran's home was performed. The search proved fruitless. Defendant's car, however, was stopped as he drove some distance from the home and a search of the vehicle revealed an ammunition clip. The vehicle was seized and a subsequent search of the trunk produced a weapon. Testimony by the officers and argument by the

assistant United States Attorney sought to justify the search on two grounds[1]:

(1) The search was incident to the execution of the warrant on Defendant's home;

(2) The seizure of the vehicle was justified as a consequence of an administrative forfeiture.

Neither ground satisfies the Fourth Amendment. First, *Summers* allows detention incident to a residential search, but only under narrow circumstances. The *Summers* court made clear that the detention should not be exploited to gain additional information and that the circumstances do not intensify the public stigma.

The majority in this case interpreted *Summers* to permit officers to extend their authority over a homeowner to an almost limitless range, depending on the circumstances:

> *Summers* does not impose upon police a duty based on geographic proximity (i.e., Defendant must be detained while still on his premises); rather, the focus is upon police performance, that is, whether the police detained defendant as soon as practicable after departing from his residence. Of course, this performance-based duty will normally, *but not necessarily*, result in detention of an individual in close proximity to his residence. *USA v. Cochran* (App. 5).

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[1] See argument of counsel of the government (App. 151-154).

The dissent recognized that the majority opinion shattered the narrow boundaries based on reasonableness delineated in *Summers*:

> I find the circumstances in this case to differ materially from the circumstances in Summers, and I, therefore, dissent with regard to the basis for the initial *away from the premises* and forced *return* which were the subject of the search warrant. *USA v. Cochran* (App. 9).

Here, the officers exploited the circumstances by waiting until Defendant drove away and then employed dramatic tactics to subdue him in full view of his neighbors. Mr. Cochran was stopped and seized by officers brandishing guns and handcuffed and forced to return to his residence.

The majority attempts to diminish the significance of the distance he had travelled from his home. Yet, the testimony reveals that Mr. Cochran was far enough from his residence that he was driven back for the search (App. 86, 101, 111, 112). He was described as being a short distance away, driving down Aspen Boulevard. (App. 86, 101, 111, 112).

Under the terms of the majority opinion, law enforcement officers on the basis of a warrant to search a residence, may "bootstrap" their authority to seize and search the homeowner or resident "not necessarily" in close proximity to their home (slip op 4-5). Contrary to the Supreme Court mandate in *Summers* the majority places its imprimatur on tactics which are virtually indistinguishable from formal arrest. Certiorari is necessary to reconcile this case with Supreme Court precedent and the mandates of the Fourth Amendment.

The second stage of the stop and seizure is equally objectionable. Once the ammunition clip was discovered, the car was seized and a subsequent "inventory" search revealed a weapon. The seizure of the vehicle either initially or after discovery of the ammunition cannot be justified as a legitimate exercise of authority under the forfeiture statute.

There is no question that the forfeiture statute gives the government enormously broad power. The standards, however, are drastically less stringent than those imposed by the Fourth Amendment. Here, by proceeding against the vehicle under a claim of administrative forfeiture the law enforcement officers removed the judiciary from the Fourth Amendment process. In its place was substituted an assistant attorney general and rather a judicially authorized warrant the officers proceeded on a "notice of intent to seize for forfeiture." The dissent recognized that the officers' consciously circumvented the judicial process:

> The police had decided previously "not to obtain an arrest warrant for his person." (J.A. 111). Officer Crock testified that they did intend to seize the vehicle through forfeiture, but no warrant for this purpose, for search of the vehicle or arrest of Cochran, was sought despite having ample opportunity to do so. *U.S.A. v. Cochran* (App. 9-10).

The officers admitted that they did not have probable cause to arrest Mr. Cochran. Yet by proceeding on a theory of administrative seizure, the officers were able to achieve the same result. The Supreme Court has made clear that administrative seizures may not be used to

mask an investigatory purpose *Able v. United States*, 362 U.S. 217 (1960); *South Dakota v. Opperman*, 428 U.S. 364 (1976); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

The officers' actions in this case reflected a gross departure from the requirements of the Fourth Amendment. What is striking about this case is that such extreme measures were taken on the basis of such a minuscule quantum of cause. Ultimately, the Fourth Amendment limits the extent of the intrusion on citizens' liberty as a function of the level of cause which exists under the circumstance. No amount of elaborate analysis or facile justification for the officers' actions can conceal the utter absence of any acceptable level of cause.

ARGUMENT

I. THE EVIDENCE SEIZED FROM DEFENDANT'S CAR MUST BE SUPPRESSED WHERE THE OFFICERS LACKED AN ADEQUATE QUANTUM OF CAUSE TO SUSTAIN AN INVESTIGATORY STOP AND INSTEAD: [1] IMPROPERLY SUBSTITUTED AN ADMINISTRATIVE FORFEITURE SEIZURE AS AN OSTENSIBLE JUSTIFICATION FOR THE STOP; AND [2] RELIED ON A TENUOUS SEIZURE INCIDENT TO THE EXECUTION OF A WARRANT FOR THE SEARCH OF DEFENDANT'S HOME TO EFFECT THE STOP.

Factual Background

The circumstances as described in detail in the statement of the case reveal that both the State and Federal authorities were tantalized by what they believed Mr. Cochran was engaged in. They made no secret of the fact

that they believed he supplied narcotics to drug traffickers. The agents' testimony was permeated with references to associations with "known" drug traffickers, alleged distribution centers and accusations of confidential informants. What was lacking was substantial evidence. Despite the surveillance of Mr. Cochran's home, place of business, daily activities, as well as investigatory stops of his automobile, the investigation failed to produce the storied narcotics. Officer Biernacki surveilled and investigated Mr. Cochran over a period of time and on February 22, 1990 obtained a search warrant for his home and place of business. The assistant attorney general also approved the administrative forfeiture of his vehicle on the same day. The following day agents of every description – AFT, DEA and Detroit Police/Great Lakes Task Force – laid in wait for Mr. Cochran to emerge from his home, enter his car and drive away. He was stopped, handcuffed and as the assistant attorney general described it at sentencing: "the defendant had no choice, but the agents were able to basically force him to open the door with his key." (App. 162). No warrant was obtained for his car and no narcotics were seized from his home.

The officers alternatively described their authority to stop Mr. Cochran as related to the execution of the warrant to search his home and seizure pursuant to an administrative forfeiture of a conveyance used in the narcotics trade. Neither explanation satisfied the Fourth Amendment guarantee of freedom from unreasonable searches and seizures.

Analysis

The trial court's conclusion that the search and seizure was justified is simply wrong. It cannot reasonably be contended that the officers had probable cause based on the observations of Mr. Cochran's activities on February 21, 1990. To authorize such extreme government action on the basis of objectively innocuous conduct is antithetical to the foundations of the Fourth Amendment. The circumstances did not establish probable cause or reasonable suspicion. Rather, they reflected the sort of inarticulate hunch condemned by the United States Supreme Court.

A search and seizure without a warrant is unreasonable per se and violates the Fourth Amendment unless it falls within an exception to the rule. Similarly, an arrest without a warrant must generally be supported by probable cause. *Beck v. Ohio*, 379 US 89; 85 S Ct 223; 13 LEd2d 142 (1964). The government always has the burden of establishing that an exception to the rule exists. *Coolidge v. New Hampshire*, 403 US 443; 91 S Ct 2022; 29 LEd2d 564 (1971). Suspicion and hunches no matter how strongly held do not amount to probable cause. *Henry v. United States*, 361 US 98; 80 S CT 407; 9 LEd2d 411 (1963). The United States Supreme Court in *Dunaway v. New York*, 442 US 200; 60 LEd2d 824; 99 S Ct 2248 (1979), recognized that the probable cause requirement for arrests is necessary because of the restraint on citizens' liberty and the serious intrusions on the personal security of those arrested. In *Terry v. Ohio*, 392 US 1; 88 S Ct 1868; 20 LEd2d 889 (1968), the Court drew a narrow exception to the probable cause requirement for brief investigatory stops supported by reasonable suspicion.

The limited authority of police officers to detain a citizen on less than probable cause was extended by the Court in *Michigan v. Summers*, 452 US 692; 69 LEd2d 340; 101 S Ct 2587 (1981). In *Summers* the police detained the occupant of a home while they were executing a warrant authorizing them to search the home for narcotics. Upon discovery of narcotics the occupant was arrested and a corporeal search revealed narcotics. While noting that the Fourth Amendment grants only limited authority to officers to detain a citizen on less than probable cause the Court held that detention of the occupant was not unreasonable for three reasons. First, the Court assumed that most citizens – unless they intend to flee – would prefer to remain and observe the search. Second, this type of detention was not viewed as likely to be exploited by the officer or unduly prolonged to obtain additional information, because the information is sought through the search and not the detention. Finally, the Court noted that detention in one's own residence could add only minimally to the public stigma associated with the search itself and does not involve the inconvenience or indignity associated with a compelled visit to the stationhouse. 452 US, 701-702.

The government action in this case extended far beyond the narrow scope of the exception described in *Summers*. Officer Bernacki's meticulous description of Mr. Cochran's exit from the house and entry into his car illustrates that he could easily, and consistent with *Summers*, have been stopped shortly after leaving the house, before he entered his car, and asked to allow the officers' entry. The circumstances here contrast sharply with those in *Summers*. Rather than electing to remain in his home to

observe the search, Mr. Cochran, after unlocking the doors, was forced to remain outside in full view of those who chose to observe the spectacle. Moreover, the detention was exploited by the officers to obtain additional evidence. Importantly, the stigma associated with the stop some distance from his home by officers with guns drawn who promptly physically restrained, then handcuffed Mr. Cochran before his neighbors is greater than the indignity associated with stationhouse interrogation. The Supreme Court in *Summers* reaffirmed that seizures of the person having the "essential attributes of a formal arrest" are unreasonable in the absence of probable cause. By delaying Mr. Cochran's seizure until he had driven a distance from his home and then employing the dramatic tactics to subdue him, the agents magnified the nature of intrusion to a level incompatible with their authority under the Fourth Amendment.

In *United States v. Carniger*, 541 F2d 545 (6th Cir, 1976) government agents used the existence of probable cause to arrest a drug dealer as a "springboard" to search an apartment and arrest another person against whom the government did not have probable cause. The Sixth Circuit suppressed the evidence and noted:

> "Several other circuits have also condemned the tactic of circumventing the Fourth Amendment requirements by manipulating the time of a suspect's arrest to coincide with his presence in a place which government agents wish to search. *Amador-Gonzalez v. United States*, 391 F2d 308 (5th Cir, 1968); *Taglavore v. United States*, 291 F2d 262 (9th Cir, 1961).

Here, the manipulation of the circumstances for the officers' advantage, subjected Mr. Cochran to a level of intrusion impermissible under the Fourth Amendment. The narrow exception expressed by the United States Supreme Court in *Terry* and *Summers* was expanded beyond the reasonableness required of every Fourth Amendment action. Accordingly, the fruits of the seizure must be suppressed.

Seizure of the automobile was also the ostensible consequence of an administrative forfeiture. The officers saw what they believed were suspicious activities on February 21, 1990. Instead of seeking judicial approval to seize the automobile, a notice of intent to seize forfeiture was obtained from the Assistant United States Attorney. Pursuant to 21 U.S.C. 881(4). The statute provides that:

> "(b) a seizure without process . . . may be made when –
>
> (4) the attorney general has probable cause to believe that the property has been used or is intended to be used in violation of this subchapter."

The statute requires only that interested parties be given notice of seizure and intent to forfeit and dispose of property and an opportunity to respond and claim the property. 21 U.S.C. 881(b)(d). The use of this enormously broad civil statute for investigatory purposes would obliterate the constitutionally mandated function of a neutral and detached magistrate. The practice would effectively vest in the attorney general the power to administratively authorize investigatory seizures in violation of the Fourth Amendment.

In *Coolidge v. Hampshire*, 403 US 443 (1971), then-existing state law authorized the New Hampshire Attorney General to issue search warrants without the intervention of a neutral and detached magistrate. This Court ruled the procedure invalid:

> Without disrespect to the state law enforcement agent here involved, the whole point of the basic rule . . . [of the warrant requirement] is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations – the 'competitive enterprise' that must rightly engage their single-minded attention." *Id.* at 450. (footnote omitted).

Irrespective of the validity of the seizure portion of the statute for purposes of forfeiture, its use in a criminal context to gather evidence violates the Fourth Amendment. The United States Supreme Court in *Able v. United States*, 362 US 217 (1960) emphasized:

> "The deliberate use by the Government of an [INS] administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts.
>
> [O]ur view of the matter would be totally different had the evidence established, or were the courts below not justified in not finding, that the administrative warrant was here employed as an instrument of criminal law enforcement to circumvent the latter's legal restriction, rather than as a bona fide preliminary step in a deportation proceeding." *Id.* at 226, 230.

Even in *South Dakota v. Opperman*, 428 US 364; 96 S Ct 3092; 49 LEd2d 1000 (1976), the Supreme Court warned

that the caretaking function of automobile impoundment and inventory searches should not be used to "conceal . . . an investigatory police motive." 428 US 364, 376 (1976). See also *Colorado v. Bertine*, 479 US 367, 371; 107 S Ct 738; 93 LEd2d 739 (1987).

This Court in *Cooper v. California*, 386 US 58 (1967) has upheld the warrantless search of a vehicle pursuant to seizure of the vehicle for forfeiture. Yet, there is a legitimate distinction between warrantless inventory searches and warrantless investigatory searches incident to forfeiture proceedings. The third circuit recently recognized this distinction in *U.S. v. Salman*, ___ F2d ___ (# 90-3355 released 9/17/91) and concluded that *Cooper* did not authorize warrantless investigatory searches under these circumstances. The Salmon Court concluded:

> "Second, in light of the differing interpretation of *Cooper*, we cannot say that a warrantless investigatory search of a vehicle as an incident to forfeiture is a specifically established and well-defined exception to the Fourth Amendment's warrant requirement. The government's interests in an incident-to-forfeiture search are similar to its interests in an inventory search – protecting an owner's property while it is in police custody, insuring against claims of lost, stolen, or vandalized property, and guarding the police from danger. In addition, the government asserts that when a conveyance is seized as forfeitable, one naturally expects agents to remove from the vehicle all non-forfeitable property. We agree, but see no reason why an investigatory search, as opposed to an inventory search, is necessary to serve this expectation as well as the legitimate government interests implicated

> upon seizure of a forfeitable vehicle. Accordingly, we cannot uphold the search as incident to the vehicle's forfeiture."

Indeed, the principles articulated in *Opperman* and *Coolidge* are unaltered in the context of forfeiture proceedings.

Here, the officers were desperate to confirm their suspicion that Mr. Cochran was a supplier of narcotics. The devices they employed, however, were intolerable under the Fourth Amendment. The authority granted officers to detain an individual during a search of their home does not extend to the practice of waiting for a citizen to drive away, then stopping the car with guns drawn, physically restraining and handcuffing the individual, and forcing him to return to the home and wait on the porch while the search is conducted. Similarly, the use of the administrative seizure pursuant to the forfeiture statute is an impermissible means of investigating a citizen or their automobile. In areas where this far ranging civil statute converges with Fourth Amendment interests, courts must strictly condemn the substitution of process and standards that are drastically less protective than those required by the Constitution. The evidence seized was improperly obtained under the Fourth Amendment, and accordingly must be suppressed.

CONCLUSION

On the basis of the above, Defendant requests that this court grant Certiorari or other appropriate relief.

Respectfully submitted,

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DATED: December 5, 1991

INDEX TO APPENDIX

Opinions & Orders

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 90-2052

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *v.* STEVEN F. COCHRAN, *Defendant-Appellant.*	)))))))	ON APPEAL from the United States District Court for the Eastern District of Michigan

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Decided and Filed July 17, 1991

Before: KENNEDY and SUHRHEINRICH, Circuit Judges; and WELLFORD, Senior Circuit Judge.

KENNEDY, Circuit Judge, delivered the opinion of the court, in which SUHRHEINRICH, Circuit Judge, joined, WELLFORD, Circuit Judge, (pp. 7-8) delivered a separate opinion, concurring in part and dissenting in part.

KENNEDY, Circuit Judge. This case, presents two issues. First, whether defendant's fourth amendment rights were violated when he was detained by police officials in order to execute a search warrant for his residence. Second, whether the District Court abused its

discretion in giving a supplemental *Allen*[1] charge to the jury rather than granting defendant's motion for a mistrial. For the following reasons, we **AFFIRM.**

I.

A.

Defendant pled guilty to possession of an unregistered firearm not identified by a serial number in violation of 26 U.S.C. § 5861(d), (i), and was convicted of interstate transportation of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1). Defendant was sentenced to 52 months incarceration on each count to run concurrently. This appeal followed.

B.

On February 23, 1990, police officers went to defendant's residence in order to execute a search warrant. Prior to the search, defendant left his residence by car. In order to promote an orderly search, the police officers thought it best to conduct the search with the cooperation of the defendant but did not want to make a forcible entrance of the residence because he was believed to always carry a firearm and a guard dog remained in the residence. Accordingly, the officers decided to stop defendant in his vehicle as he exited the premise, and to request his assistance in entering the house.

Defendant travelled a short distance before the police stopped him. The officers approached on either side of

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[1] *Allen v. United States*, 164 U.S. 492 (1896).

defendant's vehicle and ordered him to get out of the car. A rapid flurry of events ensued. As the officers approached the vehicle, defendant made a quick motion with his right arm. The officer on the driver side opened defendant's door and again ordered defendant out of the car. Defendant's right arm moved faster and the officer began to pull defendant out of the car. The officer on the passenger side believed that defendant was reaching for a gun and, while defendant was being pulled out of the car, opened the car's glove box. A nine millimeter clip fell out. The officers were aware that defendant was a convicted felon and therefore was prohibited from possessing a weapon or ammunition. A search of the vehicle ensued, and an unregistered firearm was found in the trunk.

II.

Defendant argues that the officers' seizure of his person and the search and seizure of his car were unreasonable and thus violative of the fourth amendment. According to defendant, the police officers could have served defendant with the search warrant before he entered his car and drove away. By waiting, the officers allegedly manipulated the circumstances surrounding the execution of the search warrant for defendant's residence in order to create an opportunity to search defendant's vehicle.

The District Court properly analyzed the actions of the officers as three separate events: the initial stop, the search of the glove compartment, and the subsequent search of the vehicle. Applying *Michigan v. Summers*, 452

U.S. 692 (1981), the District Court initially concluded that the police officers were justified in their initial stop of defendant in his vehicle.[2] In *Summers*, as in the instant case, the dispute focused on whether police had authority to require an individual to re-enter his house and to remain there while they executed a search warrant of such individual's dwelling.

The Supreme Court concluded that such a detention amounted to a seizure but did not violate the fourth amendment. The Court determined that the intrusion created by the detention was less than the intrusion allowed by the search warrant; that this type of detention would seldom be exploited by the police in order to gain further information; and that the public stigma associated with this detention was less than a "compelled visit to the police station." *Id.* at 701-02. The Court further noted that the justifications for such detention – preventing flight of the individual minimizing the risk of harm to the officers, and the orderly completion of the search – were legitimate and reasonable. *Id.* at 702-03. Finally, the Court observed that the existence of the search warrant provided an articulable and individualized suspicion which justified the detention. Balancing these factors, the Court concluded that "a warrant to search for contraband founded on probable cause implicitly carries with it the

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[2] The District Court also concluded that the investigatory stop and search of defendant and his vehicle was constitutional because these acts were conducted as a proper inventory search pursuant to a vehicle seizure by the Drug Enforcement Administration. We need not address this alternate ground, however, because we have determined that the officers' acts were constitutionally appropriate on other grounds.

limited authority to detain the occupants of the premises while a proper search is conducted." *Id.* at 705 (footnotes omitted).[3]

Defendant does not dispute the holding in *Summers*, but attempts to factually distinguish it from the instant case. In *Summers*, police stopped the individual as he was "descending the front steps." *Id.* at 693. In contrast here, police stopped defendant after he had driven a short distance from his home. We do not find this distinction significant, however. *Summers* does not impose upon police a duty based on geographic proximity (i.e., defendant must be detained while still on his premises); rather, the focus is upon police performance, that is, whether the police detained defendant as soon as practicable after departing from his residence. Of course, this performance-based duty will normally, but not necessarily, result in detention of an individual in close proximity to his residence.[4]

The initial detention of the police was proper in light of *Summers*. The record does not indicate exactly how far

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[3] Although not required by *Summers*, the government offered the following facts which demonstrate the risk to the officers and support their decision to detain defendant: 1) the presence of a Doberman pinscher in defendant's residence; 2) the layout of the condominium; and 3) defendant's criminal history and propensity to carry firearms.

[4] For example, an individual may park his car in a garage attached to his residence. If such garage can be accessed through an interior entrance and the garage door is electronically operated, an individual may only be accessible to the police after he has exited the garage and has driven off his premises.

defendant had travelled before being stopped. The record does indicate that the address of defendant's residence was 6316 Aspen Ridge Boulevard. At the time of his detention, defendant was travelling southbound on Aspen Ridge Boulevard and the police stopped him "almost immediately after exiting his residence." *Id.* at 53. Other testimony indicates that defendant was stopped "a very short distance" from his residence, *id.* at 62; and the court found that defendant was stopped "a short distance" from his residence, *id.* at 205. We do not find the actions of the police improper in light of the short distance travelled by defendant. Further, the facts and evidence do not suggest that the police attempted to manipulate the circumstances in order to search defendant's car. Indeed, it was defendant's acts, not those of the police, that led to the search of the automobile.

Based on defendant's acts, the police officers conducted two other searches incident to the initial stop of defendant. An officer searched the glove compartment when defendant was observed moving his right arm quickly while being ordered from the car. This search was reasonable under the circumstances. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983) (stating that "search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief . . . that the suspect is dangerous and the suspect may gain immediate control of weapons"). The product of this search – the nine millimeter magazine – gave the police probable cause to search the car. *United States v. Ross*, 456 U.S. 798, 825 (1982).

In conclusion, the initial stop of defendant for the purpose of detention while searching his home was valid. The purpose and scope of the initial stop was broadened because of defendant's, not the officers', acts. Hence, we disagree with defendant that the officers attempted to manipulate the circumstances so as to expand the scope of their search warrant. The District Court did not err in its conclusion that the acts of the police officers comported with fourth amendment requirements.

Defendant also argues that the District Court erred when it gave the jury an *Allen* charge instead of granting defendant's motion for mistrial. The jurors commenced deliberations on July 3, 1990. On July 5th, after five hours of deliberations, the jury informed the judge that "the jury is deadlocked and this will not change." Rather than granting defendant's motion for a mistrial, the District Court gave an *Allen* charge to the jury. The jury returned a guilty verdict about two hours later.

A district court's decision to give an *Allen* charge is reviewable for an abuse of discretion. *See, e.g., United States v. Sawyers*, 902 F.2d 1217 (6th Cir. 1990). We review allegations of error stemming from an *Allen* charge based on the totality of the circumstances. After a review of the record, we hold that the District Court did not abuse its discretion. *See Sawyer*, 902 F.2d at 1220-21.

III.

For the foregoing reasons, we **AFFIRM** the decision of the District Court.

WELLFORD, Senior Circuit Judge, concurring in part and dissenting in part:

I am in agreement with the decision of the majority with respect to the giving of the *Allen* charge in this case. There was no error in respect to this aspect of the case.

The district court found the initial stop of Cochran justifiable under *Terry v. Ohio*, 392 U.S. 1 (1968). While it is unclear that the officers in the case actually possessed a reasonable suspicion of danger justifying a *Terry* stop and subsequent arrest, *Terry* does not provide a means or stepping-stone for compelling the occupant of a residence, away from those premises, to return to the residence to aid in a search thereof. The district court held that this return of Cochran was justifiable under *Michigan v. Summers*, 452 U.S. 692 (1981). The majority bases its decision also on *Summers*. Summers' residence, like that of Cochran's was the subject of a search warrant for narcotics. The police "encountered" Summers, however, "descending the front steps" of his residence. *Id.* at 693. Clearly Summers was found on the very premises which were the subject of the warrant, and the police "requested his assistance in gaining entry and detained him while they searched the premises." *Id.* at 693. Although the authorities seized Summers "within the meaning of the Fourth amendment," no constitutional violation was found in respect to his being seized and detained prior to this arrest. *Id.* at 696. The court found that "a significant restraint" on Summers' liberty had occurred, but this detention had occurred fortuitously on the premises subject to the search warrant.

I find the circumstances in this case to differ materially from the circumstances in *Summers*, and I, therefore, dissent with regard to the basis for the initial *away from the premises* and forced *return* which were the subject of the search warrant. I do not, of course, take issue with the decision in *Summers* that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.* at 705 (footnotes omitted).

Actions of the police in *Summers* took place on an unplanned, contemporaneous kind of reasonable action taken as they "were about to execute" the search warrant. *Id.* at 693. Here, in contrast, the police deliberately waited until after Cochran had departed the premises and then stopped him anticipating assistance in executing the search warrant for his *residence*. I am unwilling to extend the rationale of *Summers* to a situation where the owner of premises subject to a search warrant is some distance, even a "short" distance from the premises, and is stopped, detained, or taken into custody for the purpose of assisting the police in gaining entry into the residence itself. Neither a *Terry* stop nor a forfeiture seizure of a vehicle has before been used as a means to bring about assistance in carrying out a search warrant at another location.[1] *See Terry v. Ohio; United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

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[1] Stopping a subject citizen thought to carry firearms on his person or in a vehicle on a public street away from his residence hardly seems conducive to public safety. The police

(Continued on following page)

The real focus of *Michigan v. Summers* was that a stop and detention of an owner on his premises, which were the subject of a search warrant, while the search took place and prior to arrest was not unconstitutional police conduct. I am not persuaded that this constitutes precedent and authority for the action in this case away from the premises in controversy. I, therefore, respectfully dissent from this extension of the stop and detention rule based on *Summers*. (No other authority for this action is cited by the district court or the majority opinion.)

(Continued from previous page)

had decided previously "not to obtain an arrest warrant for his person." J/A 111. Officer Crock testified that they did intend to seize the vehicle through forfeiture, but no warrant for this purpose, for search of the vehicle or arrest of Cochran, was sought despite having ample opportunity to do so. J/A 112.

No. 90-2052

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STEVEN FLETCHER COCHRAN, Defendant-Appellant.	)	ORDER (Filed Sept. 6, 1991)

BEFORE: KENNEDY and SUHRHEINRICH, Circuit Judges; and WELLFORD, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

[p. 2] Testimony Transcript – June 26, 1990

Biernacki-Direct

Detroit, Michigan

June 26, 1990

* * EXCERPT OF PROCEEDINGS * *

MS. HARTMANN: Your Honor, the Government calls Officer Gerard Biernacki.

THE COURT: Step forward. Raise your right hand.

GERARD BIERNACKI, GOVERNMENT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MS. HARTMANN:

Q Officer Biernacki, please state your full name for the record?

A Gerard Biernacki.

Q And how are you employed, sir?

A Detroit Police Department, narcotics officer.

Q How long have you been with the Detroit Police Department?

A Twenty years.

Q And how long have you been with the narcotics unit?

A Seventeen years.

Q And presently, are you assigned to the Great Lakes Organized Crime Drug Enforcement Task Force?

A Yes, I am.

Q Is that also known as OCDETF.

A Yes, it is.

Q And are you working with members of the Drug Enforcement Administration in investigating individuals for suspected [p. 3] violations of the federal narcotics laws?

A Yes. Not only with DEA, but also with ATF on firearm violations. It is a combined task force between several agencies.

Q And is there a group of individuals that you are investigating known as the Peoples Organization?

MR. PITTS: That's objectionable. That's leading, Judge. The other one was leading, too, but now we are getting to the heart of it, I think.

THE COURT: Overruled.

BY THE WITNESS:

A Yes.

Q You are investigating an organization known as the Peoples Organization?

A Yes, we are.

Q What is that?

A The Peoples Organization is a group of individuals who were previously –

MR. PITTS: (Interjecting) That is a conclusion, Judge. It calls for a fact, indeed, without any evidence to support it.

THE COURT: Overruled.

BY THE WITNESS:

A A group of individuals who were previously indicted at Federal Court known as Young Boys Incorporated. These [p. 4] individuals that I'm mentioning are – since been released from federal custody and have now gathered together again forming another organization under the head of one Timothy Peoples.

Q And what is this organization suspected of being involved in in terms of –

MR. PITTS: (Interjecting) Objection, Judge. Doesn't it call for a – in regard to his suspicion, which is really periphery or, indeed, sort of intangible.

MS. HARTMANN: Your Honor, I'm just trying to get –

MR. PITTS: (Interjecting) No, no.

MS. HARTMANN: – investigative background established.

MR. PITTS: I don't have any problem with it, Judge, except that, you know – and admittedly in an evidentiary hearing is somewhat a laissez-faire, so to speak, but I think it is going a little bit far when we allow the testimony –

THE COURT: Let's try to get to the heart of the matter.

BY MS. HARTMANN:

Q Are members of this organization suspected of violating any –

MR. PITTS: (Interjecting) That is what I object to, Judge. See, that is a leading question and also, it is – also included in that is his suspicions. And that is now what [p. 5] we are concerned about.

MS. HARTMANN: Your Honor, it does go to the heart of the matter in terms of what led up to the search and the incidents on February 23rd.

MR. PITTS: It is the suspicions, Judge, that I'm concerned about. That is not the basis of any law. I think that is the basis of perhaps investigatory work, but not the basis of any legal decisions.

THE COURT: Overruled. He may answer the question.

BY MS. HARTMANN:

Q Are members of this organization suspected of violating any federal laws?

A Yes, ma'am.

Q And what are those?

A Drug, narcotics law and firearms laws.

Q And as part of this investigation, have you conducted surveillance on a Steven Fletcher Cochran?

A Yes, I have.

Q And did you do so on February 23rd, of 1990?

A February 23rd? Yes.

Q Okay. Would that have been on – would you also have conducted surveillance on him on February 21st of 1990?

A Yes, that day also.

Q And in the course of your investigation of the Peoples Organization, have you received any information that Steven [p. 6] Fletcher Cochran is –

MR. PITTS: (Interjecting) Objection. I am going to object, now, to his suspicion now. Because I think if that is going to be the basis of the probable cause, that is all hearsay. That is all conclusion and that is all, indeed, not substantiated by any type of confrontation or, at least, I don't have any, indeed, opportunity to confront those witnesses and that is all hearsay.

MS. HARTMANN: Your Honor, defense counsel has raised the issue of the search warrant affidavit. Also, the whole motion is what got these agents and officers to the defendant's residence on the 23rd. What supported their actions in terms of seizing his car and everything else. I intend to ask him a few questions instead of just a blanket answer regarding suspicion.

MR. PITTS: My position is – excuse me, ma'am. Are you finished? I'm sorry.

MS. HARTMANN: Yes.

MR. PITTS: Okay. First of all, remember I raised, I arose with reference to the search warrant issue. She was somewhat reluctant to even admit that, indeed, it was an issue to be challenged. And then the Court then

subsequently ruled, let's deal with the motions that have been filed.

Now she wants to get into the basis of the search warrant. I don't have any problem with it if she is going to [p. 7] concede that we are going to be allowed to do that. That is number one.

Number two, there is a method, legally, that I think she is entitled to proceed and required to follow in order to get what she wants for this evidentiary hearing. Not with leading, not with, indeed, suspicion, unsubstantiated and, indeed, hearsay type of testimony, and I think that is what she is in the process of doing.

I would like to know what this officer did and what was the basis of his supposedly activity.

THE COURT: Counsel, are you intending to go into the search warrant issue? I thought we weren't going to go into that?

MS. HARTMANN: No, but some of the information that was known at the time that the search warrant was obtained also is a basis for the officers seizing the car.

THE COURT: What incident are we referring, are we dealing with now?

MS. HARTMANN: What led him to –

THE COURT: (Interjecting) What date? What date?

MS. HARTMANN: February 21st.

THE COURT: Okay. Let's see if we can move as quickly as possible to what took place on that date. Proceed.

MS. HARTMANN: All right. I just have one –

THE COURT: Go ahead.

[p. 8] MS. HARTMANN: – preliminary question to ask before we get there.

BY MS. HARTMAN:

Q What led you to conduct surveillance of the defendant on February 21st?

A I acted on information that I received that the subject Mr. Cochran was involved as a supplier of the Peoples Organization. By supplier, I mean a narcotic supplier to that organization.

MR. PITTS: That is all hearsay, Judge. That is objectionable.

THE COURT: Overruled.

BY MS. HARTMANN:

Q A supplier of narcotics?

A Yes, ma'am.

Q And where did you begin surveillance of the individual known as Steven Fletcher Cochran on February 21st?

A That was one of the locations from – 6316 Aspen Ridge Boulevard, West Bloomfield, Michigan.

Q And who lives at that residence?

A Mr. Cochran. Also, later we found, after the execution of the warrant –

MR. PITTS: (Interjecting) Excuse me. Just what he found, Judge. Just what he did and what he observed.

[p. 9] BY THE WITNESS:

A I did find documents during the search. I believe it is on the report. There were names of Latitia McKinley and also a Monica Wade. Ms. Monica Wade was present at the time of the warrant.

Q And had you seen defendant entering and exiting that residence in the course of your investigation in –

A Yes.

Q – February of 1990?

A Yes, I did. And each occasion, the subject used his own set of keys to open the door.

Q And have you seen, you have seen the defendant, or Steven Fletcher Cochran before?

A Yes, I have. He is in Court right now seated directly to the right of Mr. Pitts, wearing a dark colored sweater, light white shirt.

MS. HARTMANN: Your Honor, may the record reflect that the witness has identified the defendant.

BY MS. HARTMANN:

Q And did you know what kind ot car the defendant drove?

A Yes, ma'am, I did. It was registered to him. It is a 1986 white Volvo four door; 9-8-8, and I am not very

familiar with the letters right now, but I believe it is Sam, Paul Mary, or S-P-M.

Q And where did you see the – you saw the defendant at [p.10] Aspen, right at Aspen Ridge, the address you just gave –

A Yes, ma'am.

Q – on February 21st?

A Yes, ma'am.

Q And tell us what happened on February 21st.

A Myself and –

MR. PITTS: (Interjecting) Can we establish a time, Judge?

MS. HARTMANN: Pardon me?

THE COURT: What time of day are you talking about now?

BY MS. HARTMANN:

Q Oh, what time did you go to Aspen Ridge on February 21st?

A We usually began our surveillance, or I usually began my portion of the surveillance approximately 6:00 a.m. to 7:00 a.m. in the morning and continue the surveillance until the subject known as Mr. Cochran left that location. That varied at different times. I believe on that particular date, it was approximately 1:00 p.m., 2:00 p.m., somewhere shortly after noon or near noon.

Q Okay. Where did you first see him?

A Okay. On this particular date of our surveillance, we observed the vehicle –

MR. PITTS: (Interjecting) Excuse me. Just what he did, Judge, once again.

[p. 11] BY THE WITNESS:

A I observed the vehicle. I was in the vehicle with Task Force Agent Robert Castro.

Q Okay.

A It was our turn to have the "eye." By the "eye," I mean it was our job to watch that vehicle. If it left, to call the rest of the team. I observed Mr. Cochran come around the bend on Aspen Ridge. The car, on this particular date, was parked on four open spaces, which are on the top level. As you go up a hill into Aspen Ridge Boulevard to where you got to Mr. Cochran's condo, you were actually going up, and it leveled off. There were four spots.

The car, on that particular day, was parked in one of those four vacant spots. We had a perfect, I had a perfect eye on the vehicle by backing my vehicle into a vacated condo that the young lady who left every morning approximately quarter to 8:00, we parked in her drive, backing our vehicle in.

Q In her –

A I did. Shortly after our turn on the eye, Mr. Cochran was observed by myself to walk around a little ridge that came around from his apartment. He was wearing a waist-length leather coat with a zipper in the front. Mr. Cochran's left hand was swinging. Mr. Cochran's right hand was underneath the bottom portion

of his coat. Walked directly to the rear of [p. 12] the vehicle, the trunk area.

Q Would that have been the 1986 Volvo?

A The white Volve, yes. Opened up this trunk of the Volvo. Took a package out from beneath his right side of his leather coat, a rectangular package, similar to (sic) I've seen before in narcotics experience.

Q What did it look like?

A Brown in color, approximately ten to eleven inches. It is a rectangular form. Ten to eleven inches in width and about four to five inches in thickness.

Q In your seventeen years of experience, in investigating narcotics cases, have you seized large quantities of narcotics?

A Yes, ma'am.

Q And have you participated in search warrants where large quantities of narcotics were found?

A Yes, ma'am.

Q And have you participated in undercover activities where large quantities of cocaine, or heroine or narcotics were observed and seized?

A Yes, ma'am.

Q And are you familiar with the size, shape and packaging of large quantities of narcotics?

A Yes, ma'am.

Q Based on your experience, do individuals engaged in transporting or trafficking in large quantities of narcotics [p. 13] carry kilo-sized packages?

MR. PITTS: That's objectionable, Judge. She has asked four or five questions and all the witness has done is said yes or no.

THE COURT: Overruled.

BY THE WITNESS:

A Yes.

Q Did you get the rest of my question?

A Kilo-size packages. Yes, ma'am.

Q So you are familiar with the size, shape and packaging of kilo-sized quantities of narcotics?

A Yes, ma'am. Seizing them, testifying against, with them. Very familiar with a kilo-size package.

Q And the method of packaging?

A Yes, ma'am.

Q Could you describe for the Court the methods of packaging such quantities of narcotics?

A Yes, ma'am. Usually a kilo-size package, which weighs approximately 2.2 pounds would be wrapped in assorted colors.

MR. PITTS: That's objectionable, Judge. All we are concerned about is what he saw and what, indeed, was applicable in this particular circumstance.

THE COURT: Overruled. Proceed.

BY THE WITNESS:

A The colors might be different, but the packaging is [p. 14] usually of a very thick material. By this, it allows it, on a kilo package, you don't want any type of material that will rip easy to allow the power to escape from the package. The packaging material has a varied thickness to it.

It usually is sealed together with some sort of duct tape which holds the sides together when it is formed. Almost all the packages, ninety-nine percent of them are in a rectangular shape. Very seldom see a round kilo package. The package I saw on that particular day where Mr. Cochran came around the bend and opened the trunk up and removed from the inner part of his coat is the same type of packaging I've seen in my experience in narcotics work.

Q So based on your experience, what did that package appear to be?

A A kilo-size package.

Q Containing?

A Narcotics.

Q Okay. And what did the defendant do with that package after he took it out from inside his coat?

A The defendant was facing the trunk. The defendant then placed a package down first here and then moved it over to the right side of the trunk, fairly towards the back. Closed the trunk. Proceeded into the driver's seat. Started the vehicle up.

And it was at this time – I don't know if it was [p. 15] myself or Officer Castro, I can't say for sure – who notified the rest of the surveillance team that the subject was in the car and that the subject's car was leaving the location.

Q Did you follow the car?

A Yes, ma'am.

Q And where did it go?

Q Directly to 18403 Avon in the City of Detroit,

Q And it did not stop?

A It did not.

Q Do you know who lives at 18403 Avon Street in the City of Detroit?

A Yes, ma'am.

Q Who is that?

A George Reid, also known as "Re-Run" on the street.

Q And who is George Reid?

A George Reid was a –

MR. PITTS: (Interjecting) That's objectionable, Judge. We are concerned about what Mr. Cochran did, indeed, not this "also known as Re-Run," whoever he was. It is irrelevant and immaterial.

MS. HARTMANN: Your Honor, I think that it is relevant in terms of what the defendant was going to do with the package that he put in the trunk.

MR. PITTS: Excuse me, Judge. Thus far, we have got nothing but suspicion that supposedly has led the officer to [p. 16] follow him. Subsequently, we have got to have speculation, as she has indicated, what they were supposedly doing.

I would submit to this Honorable Court we want some facts. At least, I gather that's what we are here for, not speculation, and, indeed, not surmising, and it would seem to me that that's what we are in the process of obtaining.

THE COURT: What is the relevancy?

MS. HARTMANN: Your Honor, the relevancy is that the defendant was observed delivering what appeared to be a kilo of narcotics to a known narcotics trafficker.

MR. PITTS: Excuse me. There hasn't been any testimony to show that, indeed, this –

MS. HARTMANN: That's what I proffer.

MR. PITTS: Excuse me. Let me just rise to object. It is not easy. Judge, it would seem to me that what we are concerned about is, indeed, those things that are relevant to the arrest of Mr. Cochran. I think to go beyond that with reference to a third party calls for all types of immaterial irrelevant information which hasn't been substantiated, hearsay, and et cetera, as it relates to something else that may or may not have existed.

MS. HARTMANN: Your Honor, this is the suppression hearing. One of the issues involved is the involvement of the defendant's car in the transportation

of narcotics or in connection with suspected narcotics violations and the fact of [p. 17] where he took what he put in his trunk is relevant to one of the issues in the case.

THE COURT: Which issue?

MS. HARTMANN: The search of the car.

THE COURT: Why?

MR. PITTS: Excuse me. Yes.

THE COURT: Why is it relevant to the search of the car?

MS. HARTMANN: Well, one of the – I presume defendant's –

MR. PITTS: (Interjecting) Could we have the officer excuse, Judge, if we are going to –

THE COURT: No.

MS. HARTMANN: Defense counsel is challenging the search of that car and there are several reasons why the car was searched on February 23rd and afterwards. One of the reasons is that the car was seized for forfeiture purposes.

THE COURT: Okay.

MS. HARTMANN: And this is the background for that seizure.

THE COURT: Why do we need that background? I read your motion – it indicated that there was a forfeiture order?

MS. HARTMANN: There was not a forfeiture order.

MR. PITTS: (Interjecting) There was not a forfeiture order. That is a misreading of the alleged facts.

[p. 18] THE COURT: Excuse me. Fair enough.

MS. HARTMANN: There was not a forfeiture order. Under the statute, they gave the defendant a notice of seizure for forfeiture and this is the background that gave them the authority to do so.

MR. PITTS: After it was seized, they gave him the notice.

THE COURT: Okay. If they gave him a notice of seizure, then they gave him a notice of seizure. What does all this have to do with it?

MS. HARTMANN: This is why they gave him the notice of seizure.

THE COURT: Why is that important?

MS. HARTMANN: Well, I presume, just based on defense counsel's responses, I assume he is going to challenge that, (sic)

THE COURT: Well, let's wait until he does.

MS. HARTMANN: Okay. I'll move on.

BY MS. HARTMANN:

Q The information that you, of what you observed on February 21st, to your knowledge, did that result in the seizure of the defendant's car for forfeiture purposes?

MR. PITTS: That is objectionable. That is objectionable, Judge. That is the bottom line as to what supposedly happened on the 23rd. Why don't we just take it

step by step from the 23rd, 21st to the 23rd when the alleged [p. 19] arrest, alleged seizure took place.

MS. HARTMANN: Your Honor, he doesn't want me to get into what happened anymore on the 21st. So now I'm –

THE COURT: I don't know, I don't know that he said that.

MS. HARTMANN: Well, after he takes it to this individual's house –

THE COURT: Okay.

MS. HARTMANN: – can I go on to where he took it?

THE COURT: Only if it has some relevancy. I don't know. I don't know what relevancy all of this has.

MS. HARTMANN: To February 23rd.

THE COURT: Right. I want to get to February 23rd as quickly as we can, recognizing that there has to be some – may have to be some preliminary information –

MS. HARTMANN: Okay.

THE COURT: – in order to make the 23rd incident make sense. But if you can, I would like to get to the 23rd.

MS. HARTMANN: All right. I'll finish up with this witness, then.

BY MS. HARTMANN:

Q Were you a member of the – was the information that you obtained on February 21st part of the affidavit to

a search warrant that was issued by the United States magistrate for the defendant's residence?

[p. 20] A Yes, ma'am, it was.

Q And when was that search warrant obtained?

A I believe it was obtained on the 23rd of February.

Q Okay. And was the search conducted on February 23rd?

A Yes, it was.

Q So was it obtained the day, a day earlier?

A It could have been on the evening prior, the afternoon prior to the 22nd.

Q Okay. And were you a member of the search team?

A Yes, I was.

Q And at the time that you went to Aspen Ridge to execute the search warrant, did you have any information regarding whether the defendant had any prior history of possessing firearms?

MR. PITTS: Sort of irrelevant and immaterial, is it not, Judge?

THE COURT: Overruled.

BY THE WITNESS:

A Yes, I did. Once Mr. Cochran became involved in our investigation, it is our usual procedure or method of operation to do a criminal history on any individual coming into this investigation. I found that Mr. Cochran

was arrested by a Detroit Police Department and also, I believe it was Farmington Hills – if I'm correct at this time – several times with weapons in the vehicle.

[p. 21] And one particular occasion, 1987, involved the same vehicle, the '86 Volvo I just mentioned. In the car was Keenan Brock (phonetically), who is now deceased; and also in the car was one George Reid, who I just testified to.

MR. PITTS: Irrelevant and immaterial, isn't it, Judge?

MS. HARTMANN: Your Honor, I think that the defendant's known history of firearms possession and access to firearms is relevant in terms of what the agents did on February 23rd when they stopped his car.

THE COURT: Let's get to what they did because at this point I don't know why it would be relevant.

MS. HARTMANN: All right. Well, I'm going to bring on the next witness when I'm done, but I'm just trying to set up on what they knew when they got there on the 23rd.

THE COURT: Well, this witness shouldn't be telling me what the other ones knew.

MS. HARTMANN: Well, he was there.

THE COURT: I don't know what he did that makes his knowledge of prior weapons relevant to any issue. I haven't any idea why it has any bearing on anything. I may before I'm done, but right now I don't.

BY MS. HARTMANN:

Q When you arrived at Aspen Ridge on February 23rd, did you ever see the defendant?

[p. 22] A Myself, no. We all –

MR. PITTS: And that answers the question. He didn't see the defendant, Judge.

BY THE WITNESS:

A When I first arrived.

Q Okay. After you arrived, at some point before you went in to do the search of the residence, did you see the defendant?

A Yes, ma'am.

Q Okay. And when was that?

A It was when he was exiting the residence in the same vehicle again, driving down Aspen Ridge Boulevard, where he was detained.

Q Okay. And at the time you stopped him, he was stopped in his car?

A Yes, ma'am.

Q Okay. And did you see the stop?

A Yes, ma'am.

Q Did you participate in the stop?

A Yes, ma'am.

Q And at the time of stopping him in his vehicle, did you know of his prior history that you had just, that you have just described regarding gun possession?

A Yes, ma'am.

Q And the 1987 incident that you alluded to, were you aware [p. 23] of that?

A Yes, ma'am.

Q And what were you aware of at the time you stopped the defendant?

A The complete history that we did on the individual, and that is why we waited until he left the premises, is that the subject always carried a firearm, somewhere on his person or near him in a vehicle.

It was the general conclusion, which I agreed upon, to allow the subject to leave the premises before executing the warrant so that we were in a more open area so that we could contain. If anything happened, everything was out in front of us, as in terms of breaking down his door where we have no knowledge of what is going on.

Q And when was the first time that you observed the defendant on February 23rd? Where was he?

A He was in the vehicle, driving it, coming down, which would have been, that would be south bound on Aspen Ridge Boulevard, almost immediately after exiting his residence.

Q And after he was stopped, what happened to the defendant?

A As I stated, he was detained. Several of the agents from ATF and DEA took control of not only Mr. Cochran, but also the vehicle.

Mr. Cochran was returned directly back to Aspen Ridge after being notified of a federal search warrant for his [p. 24] premises. Because of a Doberman Pincher in the house, Mr. Cochran was also allowed to open the door with the key so that we may control the animal at that time so no shots would have been fired to either destroy the animal or anybody else being hurt. Mr. Cochran agreed to it. The animal was secured. The house was then searched.

MS. HARTMANN: I have no further questions of this witness, Your Honor.

THE COURT: Cross-examine.

MR. PITTS: May it please the Court?

CROSS EXAMINATION

BY MR. PITTS:

Q Hi, Mr. Biernacki, how are you?

A Fine, Mr. Pitts. How are you, sir?

Q Mr. Biernacki, let me, if I may, just get to the heart of the matters as it relates to your observations on the 21st of February, correct?

A Yes.

Q If I'm not mistaken, I think you indicated that you are a law enforcement officer of twenty years of service with the Detroit Police Department, correct?

A Yes.

Q Seventeen years of service and experience in dealing with those who are allegedly violating the state and federal narcotic laws, correct?

[p. 25] A Yes, sir.

Q And you have participated in the arrest and investigation of hundreds of individuals so involved, isn't this true?

A Yes, sir.

Q Not only with reference to half kilos, kilos and ounces, but grams and et cetera, right?

A Smaller than that, yes, sir.

Q Because the mere possession is a violation of our law, isn't that correct?

A That's true, sir.

Q And you have learned, as a results [sic] of the questions as you have been providing us earlier, that there are certain methods and certain observations that one is exposed to in surveillance and conducting your work, correct?

A Yes, sir.

Q And that there is a general pattern that allegedly those engaged in narcotics often generally fall, correct?

A No, I won't agree with that.

Q Well, you indicated that the, the package that supposedly transports narcotics is wrapped like a football, or wrapped like a little package, didn't you say?

A No, I never said football. A rectangular shape.

Q But, of course, you know, a rectangular shape package can contain something other than narcotics, isn't that correct?

A It could, but in my experience it never has.

[p. 26] Q Excuse me. I didn't ask you about your experience. I am just asking you whether or not you knew what was inside of that package. That's my real question. Did you know what was inside of it?

A Did I know what was inside?

Q Yes.

A No.

Q All you had was some suspicion, isn't that correct?

A Yes.

Q Yes or no? You had some suspicion, right?

A I already answered "yes."

Q Okay. Fine. And it was based upon that suspicion that you allegedly followed, isn't that correct?

A Yes, sir.

Q You didn't holler or didn't radio in to somebody at your main office and say, "Listen, there are some known narcotics in there. We need an arrest warrant and a search warrant." You didn't do that, did you?

A No, I didn't, sir.

Q Because you didn't have enough information at that time to get an arrest warrant or a search warrant, did you?

A I don't know, sir.

Q Excuse me, sir. Did you try to get one?

A No, I didn't

Q We are talking about a gram. We are talking about a [p. 27] kilo, right?

A Right.

Q Now, you have got all this experience. A kilo is 2.2 pounds you said, right?

A Yes.

Q Listen, that is worth the value of how much wholesale at that particular time?

A I don't know, sir. Each dealer is different.

Q Listen, it had to be worth fifteen to 20,000 dollars, isn't that correct, bulk?

A Could be.

Q And then, of course, if you break it down, it is worth hundreds of thousands of dollars if you sold it on the street, isn't that correct?

A Yes, sir.

Q And your objective is to keep that poison from going on the street, isn't that correct?

A Yes, sir.

Q Yet and still, what you are telling this Honorable Court you didn't get a search warrant, you didn't get an arrest warrant, and you just don't know why, is that what you are telling the Court?

A No, I'm not going to answer question that way.

Q Well, you didn't get one, did you?

A No, and I didn't attempt to get one.

[p. 28] Q Because you didn't know what was inside of it, did you?

A No, I didn't.

Q Fine. In any event, you followed him over to someplace on the west side in the City of Detroit.

A On Avon.

Q Did you contact your superiors and/or you cohorts and say, "Listen, keep that house under surveillance, survey the front door and the back door," and et cetera, so whoever has brought that package in, that package can't get out?

A Yes, sir.

Q Fine. Then you subsequently executed a search warrant for that house, didn't you?

A No, we didn't.

Q Well, you said you surrounded it with officers, didn't you?

A No. I never said that.

Q Oh, I thought you just indicated that you had that house kept under surveillance?

A Right. I don't surround it. The house was kept under surveillance. Mr. Cochran left approximately ten minutes after arriving.

Q I'm not asking about Mr. Cochran. I'm just dealing now because the subject matter came up. With reference to that package in that house.

A Right.

[p. 29] Q Did you do anything with reference to that house or with reference to the individuals within that house to try and get that package out of there?

A No, sir.

Q All that dope. You said it was 2.2 pounds of dope, didn't you?

A They all left within ten minutes.

Q You said it was possibly 2.2 pounds of dope, didn't you?

A Yes, sir.

Q And they all left?

A Right, sir.

Q You didn't get a search warrant, did you?

A For an empty house?

Q I just asked you did you get a search warrant again?

A No, I did not, sir. I already answered that.

Q Okay. Fine. Did you get a search warrant the next day?

A No, we didn't.

Q Did you keep the house under surveillance the whole twenty-four hours of the 21st and/or the 22nd?

A No, sir, we followed Mr. Cochran.

Q Now, let's get on to the 23rd.

A Yes, sir.

Q You participated in the arrest of Mr. Cochran, didn't you?

A Yes.

Q Now, correct me if I'm not mistaken. The Assistant U.S. [p. 30] Attorney has talked about a search warrant, isn't that correct?

A That's true.

Q That some of this information that you had in the past supposedly was the basis of securing the search warrant, isn't that right?

A That's true.

Q Along with the information of supposedly this package that supposedly went inside of a vehicle, correct?

A That's part of it.

Q That you had no identity or, at least, had no basis, in fact, of knowing what was inside of it, isn't that correct?

A That's correct.

MS. HARTMANN: Your Honor, I object to that. That is a misstatement of what he has testified to.

MR. PITTS: This is cross examination, isn't it, Judge.

THE COURT: Next question, please.

MR. PITTS: Thank you.

BY MR. PITTS:

Q The fact of the matter is, is that on the 23rd you went out there armed with this search warrant for a premises, isn't that correct?

A Right, sir.

Q Fine. And the premises was listed as numerically what?

A 6316 Aspen Ridge Boulevard.

[p. 31] Q Now, you have indicated that you purposely waited for Mr. Cochran to come out of the home, isn't that correct?

A That's true.

Q Because you had heard, supposedly, or your investigation had revealed that, listen, the man is dangerous, isn't that right?

A That's true, sir.

Q But even dangerous people are entitled to the law, that is, indeed, you have to follow the law with reference to dangerous people, isn't that correct?

MS. HARTMANN: Objection. Argumentative.

THE COURT: Overruled.

MR. PITTS: Excuse me. Thank you.

THE COURT: Next question, please.

MR. PITTS: I didn't get an answer, Judge.

BY MR. PITTS:

Q Aren't dangerous people entitled to the full benefits of the law?

A Yes, sir.

Q Fine. The search warrant was for the premises, correct?

A Yes, sir.

Q The search warrant didn't include the car in the driveway, did it? Did the search warrant include the car in the driveway?

A I don't think so.

[p. 32] Q The search warrant didn't include a vehicle at all, did it?

A I don't believe so.

Q The vehicle, indeed, I think you described as supposedly parked in a parking lot area, initially when you saw it, correct?

A On that day?

Q Yes.

A No.

Q When you saw it initially, it was pulling away from the apartment complex?

A Came out of the garage.

Q Was driving down Aspen College, (sic) some kind of road, leading to the main street?

A Aspen Ridge, right, sir.

Q Some distance away from the home.

A I stated earlier in my testimony a very short distance.

Q Some distance away from the home?

A Yes.

Q Fine. The fact of the matter is you and your fellow officers then proceeded to go up and stop the vehicle, did you not?

A Yes, sir.

Q At that particular time, you had reason to believe that, indeed, that there was an escaped felon in that car, correct?

[p. 33] A No.

Q That particular time you had reason to believe that, indeed, the man was involved in some criminal activity, correct?

A Yes.

Q You had some suspicion, didn't you?

A Yes, sir.

Q And that is all that you had at that particular point because you had no facts that there was anything illegal inside of that car, did you?

A Inside the car?

Q Excuse me. Did you have, did you know that there was a gun to be found inside of that little steering wheel? Did you know that?

A No, not prior to stopping him.

Q The fact of the matter is you didn't know what was inside of that car, did you?

A Not until we stopped him.

Q The fact is you didn't know anything about the contents of the car until you stopped it, correct?

A That's what I just said, yes, sir.

Q And the man that was driving the car, to the best of your knowledge, had not violated the law in your presence, had he?

A No, sir. On that particular day.

Q Fine. As far as you know, there was no law that the man [p. 34] had violated in driving that vehicle, isn't that correct?

A That's true, sir.

Q And there was no knowledge in your mind as to what the contents of that care contained, correct?

A Right, sir.

Q But you stopped it, didn't you?

A Right, sir.

Q And after you stopped it, did you order the man out and pulled him, whatever it was, right?

A No one pulled him out. He got out of the car.

Q Well, you got him out?

A Right, sir.

Q And you stopped him from exercising his freedom of movement, didn't you?

A He was detained.

Q Then you proceeded to search the vehicle, correct?

A I didn't, no. I don't know if anyone else did.

Q Your associates proceeded to search the vehicle, didn't they?

A They may have. I know I talked to Mr. Cochran. I was one of several persons who advised him of the search warrant.

Q I didn't ask you what happened. I asked you, did you search the vehicle?

A I did not, no.

Q You went back to the house?

[p. 35] A Right.

Q You took Mr. Cochran back to the house in handcuffs, didn't you?

A I believe he was, but then he was uncuffed to open the door.

Q He was uncuffed to open the door?

A I believe he was uncuffed then to open the door.

Q Okay. Did you uncuff him?

A I didn't, no.

Q Had you cuffed him?

A No, I did not.

MR. PITTS: Excuse me. With the Court's permission.

(Brief pause)

BY MR. PITTS:

Q Didn't one of your associates drive that car back to the apartment complex?

A I believe so. Mr. Cochran didn't drive it.

Q Mr. Cochran certainly didn't drive it back, did he?

A That is what I stated, yes.

Q Would it be a fair statement to make that with the exception of the search warrant, that was the only color of authority that you had at that particular time to go to that residence?

A Well, that's why –

Q (Interjecting) Do you understand the question?

[p. 36] A I do in a way.

Q You were out there to execute a search warrant, isn't that correct?

A Right. That's true.

Q And that was your primary purpose to get inside of that house to see if there was that dope there, isn't that right?

A That's true.

Q Of course, you really wanted to catch Mr. Cochran inside of the house with the dope, didn't you?

A I have already testified what our plan was.

Q Your plan was what?

A I didn't say that. Our plan, because of the knowledge –

Q (Interjecting) Excuse me, sir. Your plan was –

A – I have testified to it once already.

MS. HARTMANN: Your Honor.

MR. PITTS: I'll withdraw the question.

BY MR. PITTS:

Q The plan, was it not, to have Mr. Cochran outside of the house when you executed this search warrant?

A Thank you, sir. Yes, sir.

MR. PITTS: I have no further questions. Thank you.

THE COURT: Any questions?

REDIRECT EXAMINATION

BY MS. HARTMANN:

Q Officer Biernacki [sic], do you know whether DEA was planning [p. 37] to seize –

MR. PITTS: That is objectionable. He can't testify as to what was in the knowledge of other people, Judge.

THE COURT: Let's hear the question, Mr. Pitts.

BY MS. HARTMANN:

Q Do you know whether DEA was planning on seizing the vehicle, based on your observations from February 21st?

MR. PITTS: That's objectionable, even though I don't –

MS. HARTMANN: He –

MR. PITTS: Excuse me. How can be testify to what was in the mind of these other people, an agency, a fictional agency at that?

THE COURT: I'm assuming the question asks, was such information communicated to him?

MR. PITTS: I don't have any problem with it.

MS. HARTMANN: I'll rephrase it, Your Honor.

BY MS. HARTMANN:

Q Was information communicated to you by members of the DEA that they were planning on seizing –

MR. PITTS: (Interjecting) That's objectionable. Now, that is a different question, Judge. See, she is talking about what DEA conveyed to him rather than, was the information shared that you had from your observations of the 21st with DEA, which I really wouldn't object to, because we got a [p. 38] search warrant that is coming out and the search warrant has, as part of it, that particular observation. I don't have any problem with it.

THE COURT: The objection is overruled. He may answer the question.

BY THE WITNESS:

A Yes.

Q You knew that DEA was planning on seizing that vehicle based in part –

MR. PITTS: (Interjecting) Judge, that's leading. We haven't got DEA. We got him here to testify.

MS. HARTMANN: Your Honor –

MR. PITTS: Why are we going to have her come in with supposedly the basis of wanting to seizing the vehicle.

MS. HARTMANN: – I guess I'm just, I'm just trying to have a clear record here because of the continuous objection to make sure that there is one fluid answer.

MR. PITTS: Excuse me. Like I don't want a clear record, Judge. You know, I think that is unfortunate. But be that as it may, I object because I'm a lawyer. I think you know, Judge, that I'm entitled and responsible for

doing that. Now, whether or not it interrupts the flow is another matter, but I think I have an obligation.

THE COURT: What is the question you want the witness to answer?

[p. 39] BY MS. HARTMANN:

Q What, if anything, did you know from DEA regarding what they were going to do with this car, the 1986 –

MR. PITTS: (Interjecting) Hearsay, Judge.

Objectionable.

THE COURT: Overruled.

BY MS. HARTMAN:

Q – Volvo?

A From DEA agents were present at the scene and some who had joined us in on the surveillance during this time, I had knowledge that on that date, they had planned to seize that 1986 white four-door Volvo.

Q And that is seizure for what purpose?

A Transporting narcotics. Used in transporting narcotics from certain locations to other locations in the city.

Q And that would be seizure for forfeiture purposes?

A Yes, ma'am.

Q And based on, in part on information that, or based in part on your surveillance on February 21st, did, in fact, other agents of OCDETF obtain a search warrant for defendant's residence?

A Yes, ma'am.

Q Was a search warrant obtained for George Reid's residence?

MR. PITTS: That is objectionable. Irrelevant and immaterial, Judge.

[p40] MS. HARTMANN: Your Honor, he brought it up.

THE COURT: Overruled.

MR. PITTS: Excuse me, Judge. In all due respect, is the Court ruling as the results what supposedly I questioned the witness about?

THE COURT: Yes.

MR. PITTS: What did I ask, Judge, that prevents –

THE COURT: Counsel, I've overruled the objection.

MR. PITTS: I don't have any problem with it, Judge.

THE COURT: Please follow the ruling. You know the rules. I have ruled.

MR. PITTS: I just want, for my own mind, I want some clarification.

THE COURT: Counsel, I have ruled. He may answer the question.

BY THE WITNESS:

A Yes, a search warrant was obtained for 18403 Avon at the same time the search warrants were obtained

for Aspen Ridge Boulevard and 12th and Calvert, Worldwide Supermarket.

Q And what is Worldwide Supermarket?

A It is a location where we had followed Mr. Cochran to on several locations. It is a liquor, large liquor store at the corner of 12th and Calvert in the City of Detroit. It is also one of the locations where he disbursed narcotics from.

MR. PITTS: That is objectionable, Judge. That is a [p. 41] conclusion without any basis in fact.

THE COURT: Overruled. Next question, please.

MS. HARTMANN: Your Honor, I'll move on.

BY MS. HARTMANN:

Q The garage that you referred to, the defendant's garage at Avon Street, what kind of a garage was that in terms of your line of vision?

A It is the type of garage where you, when you drive into it, when the door opens of the garage, when you drive into it, you are actually with inside of that building itself, that condo. You can exit your car and walk right into the hallway or, you know, the condo itself. It is enclosed within the building.

Q And at the time that you stopped, you and other members of the search team stopped the defendant, you alluded to a 1987 incident involving the defendant and George Reid.

A Yes, ma'am.

Q Did you know through police reports or discussions with police officers involved in that stop the particulars –

MR. PITTS: (Interjecting) That is a leading question, Judge.

MS. HARTMANN: I'm just trying to establish how he knew. I will admit that it is hearsay.

THE COURT: What relevance does it have to the issues?

[p. 42] MS. HARTMANN: In terms of his potential dangerousness in justifying why they stopped him. Their state of mind when they see the defendant –

THE COURT: I don't know about theirs. You had completed your questioning of him, and I don't know where you are going now.

MS. HARTMANN: I'm just trying to finish up with that incident. He started to say what he knew about that incident, and I just want to finish that up and I'm done.

MR. PITTS: Well, you know that's been asked and answered on direct, Judge, with reference to supposedly what they knew at the time the defendant was stopped on Aspen Drive.

THE COURT: You may ask the question.

BY THE WITNESS:

A It was the same particular vehicle. The same vehicle Mr. Fletcher was driving that day. I, along with other officers, but I know I had to interview each of the

officers involved in that particular arrest in 1987 as to what was seized and I put a hold on all the evidence. That includes all the weapons taken from that car and bulletproof vests.

Q Do you know if Steven Fletcher Cochran was in the car during that arrest?

A Yes, he was.

Q And who was he with?

A George Reid, from 18430 Avon and one Keenan Brock, who [p. 43] has since died.

Q And did the officers indicate why they had stopped that car?

MR. PITTS: That's objectionable, Judge. That is irrelevant and immaterial now.

THE COURT: Overruled. I assume this is information that he used in making his decisions. Proceed.

BY THE WITNESS:

A The officers that I interviewed on that particular stop, they arrested, indicated that they made a –

MR. PITTS: (Interjecting) That's also hearsay, isn't it, Judge.

THE COURT: Overruled. Proceed.

BY THE WITNESS:

A They had made the stop on information received that this particular vehicle was being, the occupants of that vehicle were going to do a hit on someone in the City

of Detroit. By "hit," I mean shooting, murder, something was going to happen with the occupants of that vehicle. When they stopped it, they verified a lot of the information by finding the subjects wearing bulletproof vests and inside the vehicles, several automatic, semi-automatic weapons.

MS. HARTMANN: I have nothing further, Your Honor.

THE COURT: Mr. Pitts, any questions?

[p. 44] RECROSS EXAMINATION

BY MR. PITTS:

Q Sir, you related to the Court in detail some information regarding an incident that took place in Detroit in 1987 involving this defendant, haven't you?

A Yes, I have.

Q You notice the assistant prosecutor didn't ask you if that case went to trial and what was the results of it, did she?

A No, she didn't.

Q Of course –

MS. HARTMANN: Excuse me.

MR. PITTS: Excuse me. I'm sorry. Go right ahead.

THE COURT: Next question, please.

BY MR. PITTS:

Q You did learn that as a results of that particular proceeding, that particular action, there was a Jury trial on that matter, wasn't there?

A Yes, sir.

Q All of the defendants were found not guilty, isn't that correct?

A That's true, sir.

Q Notwithstanding all of these horrible things that you have talked about, with reference to a gun allegedly being seized, a bulletproof vest being seized, the defendants were [p. 45] found not guilty, weren't they?

A I answered that, yes, sir.

Q Excuse me, sir. You don't mind my asking the questions?

A I did. I answered, yes, sir.

Q All right. Fine. Now, it is your testimony here also that on the day that this incident occurred in February, February the 23rd, you knew that the DEA was going out there to seize a vehicle, isn't that right?

A That's not the basis for us stopping him.

Q Excuse me. I didn't ask you that. Why don't you try to respond to my questions in the same polite and thorough manner that you did for the Assistant U.S. Attorney?

A Okay, sir, I'll try.

Q You did testify, did you not, that the DEA was going out there and they were going to seize this car because it had been used to transport narcotics, isn't that right?

A Yes, sir.

Q And, of course, you knew that there were narcotics in that car because you saw them, didn't you?

A I didn't hear that one.

Q Excuse me. You knew that there were narcotics in light of the answer to the last question. They were going to seize the car because it had transported narcotics. You knew that there were narcotics in there because you had seen them, isn't that true?

[p. 46] A No.

Q Well, you didn't know that there were narcotics in the car?

A Are you calling them narcotics?

Q Excuse me, sir. I'm just asking you.

A Sir, I'm using –

Q Now, just try to respond to my question, all right?

A – I'm trying to answer your question.

MS. HARTMANN: Your Honor –

Q Did you see narcotics in the car?

A No.

Q You didn't know they were narcotics or not, did you?

A No.

Q Fine. Now, you are telling us that on the 23rd, the DEA without even knowing what was inside of the car, went out there to take somebody's property without any due process of law? Is that what you are telling us?

A Yes.

Q I mean, without factually knowing what was going on, they were just going to seize this man's vehicle?

A Yes, sir.

Q You made the observation on the 21st, correct?

A Yes, sir.

Q On the 22nd, the Courts are open, correct?

A I believe so, yes, sir.

[p. 47] Q To the best of your knowledge, did you or your colleagues come in front of one of these Honorable Courts or magistrates and say, "Listen, we want an arrest warrant. We want a seizure. We want some type of document authorizing us by the Court to seize that vehicle." Did you get that?

A Yes, sir. Seize the vehicle.

Q Excuse me, sir. Wait just a minute.

A You said search warrant or seize the vehicle?

Q Wait just a minute. Remember you got a search warrant, right?

A Right, sir.

Q I mean, you had to appear in front of a Judge to get a search warrant signed, didn't you?

A I don't believe it was me, but –

Q No. No. But you have worked out here in the field.

A Someone did, yes.

Q You have gone in front of a magistrate to get a search warrant as an affiant, haven't you?

A Yes, sir.

Q All right. Countless number of times, correct?

A Yes, sir.

Q And the reason you are doing that is because you want to invade somebody's privacy, isn't that correct?

A No, sir.

Q Well, you have to go through somebody's house, don't you?

[p. 48] A Well, I have to go to someone's house. I don't know if I –

Q (Interjecting) You have to get permission to do that, don't you?

A Yes, we do.

Q Well, property, you know, the car belongs to somebody, didn't it?

A Yes, it did.

Q Did you go in front of one of these Courts and get some permission from a Court to seize that car?

A I didn't, no.

Q Did one of your colleagues do that?

A I don't think so.

Q And you didn't do it on the 22nd, or at least your reason would be applied, applicable for the 22nd, as well as the 23rd, isn't that correct?

A On a seizure warrant or on the warrant?

Q Sir, just listen to my question.

A Well, I don't understand that one. Did we go –

Q Well, just answer the – ask me, answer it –

A I just tried.

Q – by saying, "I don't understand the question."

A That's what I just did.

Q Fine. On the 21st, when you made the observation, did you go back to the Courts and get somebody to give you a [p. 49] warrant to seize that vehicle?

A On the 21st?

Q Yes.

A No.

Q And you work more than eight hours a day, don't you, sometimes?

A Sometimes.

Q And you have access to some of these Judges or magistrates who are on duty twenty-four hours a day, don't you?

A Yes, sir, I know that for a fact.

Q Fine. You didn't go out for the whole twenty-four hours of the 21st and get an arrest warrant for the individual and/or the seizure of the vehicle, did you?

A Twenty-four hours on the 21st?

Q Excuse me, sir. For the entire day of the 21st, did you go to one of these magistrates or get any judicial proceeding to arrest the individuals involved and/or to seize their property? Did you do that?

A No.

MS. HARTMANN: Your Honor, with respect to the property, I will stipulate that he did not do that.

MR. PITTS: I don't want any stipulations. Thank you.

BY MR. PITTS:

Q Did you do that?

[p. 50] A On the 21st?

Q Yes.

A No.

Q But you made these observations?

A Yes.

Q You reported them back to your superiors and co-workers?

A Right, sir.

Q Did your co-workers, to the best of your knowledge, do that? That is, go and get a judicial authority to arrest the individuals and/or seize the property that was involved?

A On the 21st?

Q Yes.

A No.

Q Did you do that on the 22nd?

A I believe it was the 22nd, late afternoon.

Q Show me, then, what you secured in order to seize the property that was involved? What did you get?

A A search warrant. To seize property, no.

Q Okay. Now, let's go back. You didn't do it on the 21st, which was the day the observation was allegedly made?

A Right.

Q Even after the evening, during the evening until the late hours of the 21st when a magistrate is available, right?

A Right, sir.

Q You didn't do it on the 22nd? To seize the property. [p. 51] I'm not talking about the search warrant.

A Seize property, no. Seize property, no, sir.

Q But you did get a search warrant, didn't you?

A Yes, we did.

Q And you could have likewise indicated to the Court that, listen, there was dope in that car. We want to seize that car, didn't you?

A I did not. I did not apply for it.

Q Well, listen, you made the observation, didn't you?

A Yes, I did.

Q You were the alleged probable cause, aren't you?

A I believe I am.

Q Now, let me –

MS. HARTMANN: (Interjecting) Your Honor, he already testified –

MR. PITTS: Excuse me. Is there an objection? I'm sorry.

MS. HARTMANN: There is an objection. He is asking this witness something beyond his personal knowledge. He testified that DEA was handling that aspect.

THE COURT: Well, I don't know what is beyond his personal knowledge.

MR. PITTS: He is part and parcel of the DEA.

THE COURT: Proceed. What is your question?

MR. PITTS: Thank you.

[p. 52] BY MR. PITTS:

Q Now, you didn't do it on the 23rd either, did you?

A I never did it.

Q You never did it. Your co-workers, to the best of your knowledge, didn't secure a judicial proceeding or go through one in order to seize the vehicle according to Title 18, 18, Title 18, 881, did you?

A To the best of my knowledge, no.

Q Would it be a fair statement, as I indicated on previous cross examination, the only document you had, court-wise, when you went out to this residence on the 23rd, was a search warrant?

A That's true, sir.

Q And the primary purpose, as you have indicated on the previous question, was that trying to find that dope in that house, isn't that right?

A No, sir.

Q Excuse me. You went there to get some dope, didn't you?

A It is not my main –

Q (Interjecting) Excuse me. Excuse me, sir.

A Can I answer your question?

Q Excuse me. No.

A You asked me a question.

Q My question was –

THE COURT: Mr. Pitts, let him answer the question.

[p. 53] BY MR. PITTS:

Q Did you go to get some dope? That's what the question was. Yes or no.

A We went to execute a search warrant –

Q Excuse me, sir. I'm not asking you about executing a search warrant.

A – for narcotics.

Q My question was, and the Court will assist me, if necessary, you went to get some dope, didn't you? Yes or no.

MS. HARTMANN: Your Honor, I object. This is asked and –

MR. PITTS: What is the objection?

THE COURT: Objection sustained. He answered the question, Mr. Pitts. What is your next question? All questions cannot be answered yes or no, sir. What is your next question?

MR. PITTS: I want an answer anyway, anyhow he puts it then.

THE COURT: Well, he was trying to answer it and you keep interrupting him.

MR. PITTS: I'm sorry.

THE COURT: Try another question and then let him answer.

BY MR. PITTS:

Q Incidentally, you went out there looking for dope, didn't [p. 54] you?

A That was part of the search warrant, yes.

Q You didn't find any dope there, did you? Sir, did you find some dope there?

A No. I was getting ready to answer.

MR. PITTS: Fine. I have no further questions.

THE COURT: Any questions?

MS. HARTMANN: No, Your Honor.

THE COURT: You may step down. The witness is excused.

THE WITNESS: Thank you.

(Witness excused)

MS. HARTMANN: Your Honor, the Government calls Special Agent Richard Crock.

THE COURT: Please raise your right hand.

RICHARD CROCK,
GOVERNMENT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MS. HARTMANN:

Q Agent Crock, could you state your full name for the record, please?

A Yes. Richard Crock.

Q And how are you employed, sir?

A Special Agent for the Drug Enforcement Administration.

Q How long have you been employed with DEA?

A About five years.

[p. 55] Q And prior to that, do you have any law enforcement background?

A Yes. I had seven years prior to that law enforcement, I ve in narcotics.

Q And as a special agent with DEA, as part of your duties, do you assist in the execution of search warrants?

A Yes, I do.

Q And are you involved in an investigation of a Steven Cochran versus –

MR. PITTS: I will relinquish a release, accept and stipulate to all that. Let's deal with what happened on the 23rd, Judge.

BY MS. HARTMANN:

Q Have you seen Steven Fletcher Cochran before?

A Yes, I have.

Q In the course of your investigation of him?

A Yes.

Q And do you see him in the courtroom today?

A Yes, I do.

Q Would you identify him, please?

A Yes. He is sitting at counsel table, black sweater, dark pants, white shirt.

MS. HARTMANN: Your Honor, may the record reflect that the witness has identified the defendant.

[p. 56] BY MS. HARTMANN:

Q And did you participate in the execution of a search warrant at Steven Cochran's residence on February 23rd of 1990?

A Yes, I did.

Q And was a search warrant obtained from the United States magistrate?

A Yes, there was.

Q Do you know when that was?

A The day prior to that?

Q And information contained in the search warrant affidavit, are you familiar with that?

A Yes, somewhat.

Q And was there any information contained in that affidavit and that you were aware of with regard to a car that was registered to the defendant?

A Yes.

Q And what, what kind of information did you have?

A Basically, on February 21st, the car was observed on surveillance driven by Mr. Cochran from the Aspen Ridge address to an Avon address. Mr. Cochran placed a, what appeared to be a kilo-size package in the trunk of the vehicle and transported it from Aspen Ridge over to Avon.

Q And did you know who resided at Avon?

A Yes, George Reid.

Q And who is he?

[p. 57] A He is a narcotics trafficker in the Detroit area.

MR. PITTS: That's objectionable, Judge.

THE COURT: Overruled.

BY MS. HARTMANN:

Q Based on information that you had, who is George Reid?

A He is a narcotics trafficker in Detroit, Michigan.

Q And would he be a member of what is known as the Peoples Organization?

A Yes, ma'am.

Q Okay. And you went, did you go to Aspen Ridge to execute the search warrant on February 23rd?

A Yes, I did.

Q And did you have any other responsibilities on that day besides searching the defendant's residence?

A. Yes I did. I was, I was part of team that was assembled to detain Mr. Cochran as he left the residence.

Q And did you have any responsibilities with respect to the defendant's car on that day?

A Yes. I was going to seize the vehicle on that date.

Q And you were going to seize the car for what? For what legal proceeding?

A Administrative DEA forfeiture proceeding.

Q Okay. And what is the, what is the DEA policy with respect to forfeiture of vehicles?

MR. PITTS: Irrelevant and immaterial, Judge.

[p. 58] THE COURT: Ms. Hartmann.

MS. HARTMANN: Your Honor, that's part of the defendant's motion with regard to suppression of the, of the evidence. It is the legality of the stop and just bringing out one of the, how it came about that the car was stopped.

MR. PITTS: Excuse me. Defense counsel's motion is based upon an illegal arrest of the defendant and/or those things that were taken from him incidental to that illegal arrest.

MS. HARTMANN: As such –

MR. PITTS: And – excuse me, ma'am – with the Court's permission.

Our position is, indeed, the defendant was illegally arrested. At the time of the illegal arrest, everything that transpired thereafter, ab initio, was illegal as it relates to the rights of the defendant. It's a *Wong Sun* argument.

THE COURT: The objection is overruled.

THE COURT: Proceed.

BY THE WITNESS:

A Okay. Would you repeat your question, please?

Q Yes. Could – Agent Crock, could you describe the procedure and the policy for forfeiting cars?

A Basically, DEA procedure calls for, whenever probable cause exists, to seize a vehicle that has been utilized in violation of the Controlled Substances Act, we seize the [p. 59] vehicle.

Q And that is for suspected violations of federal narcotics laws?

MR. PITTS: That's objectionable, Judge. His question dealt with the probable cause. The last question deals with supposedly suspicion.

THE COURT: Overruled

BY MS. HARTMANN:

Q Is that for –

A Could you repeat that, please?

Q – suspected violations of the federal narcotics laws?

A Yes, ma'am.

Q And that is DEA policy

A Yes.

Q Is there also a statute that governs forfeiture?

A Yes.

Q Seizure for forfeiture?

A Yes, ma'am.

Q And consistent with DEA policy and the statute, are you required to obtain a seizure warrant for all conveyances that you are going to seize for forfeiture?

A No, ma'am.

Q And what is the only type of conveyance for which you are required to obtain a seizure warrant?

MR. PITTS: I think she is dealing with the law, [p. 60] Judge. I'm not too sure this man has the expertise to cite law. I think it is for the Court, indeed, to –

THE COURT: Counsel, what statute are you talking about?

MS. HARTMANN: I'm talking about DEA policy and as pursuant to Section 881(B)(4) of Title 21.

MR. PITTS: Well, I'm not sure that he is qualified.

THE COURT: Are you asking what the statute provides?

MS. HARTMANN: Well, DEA policy pursuant to the statute.

THE COURT: I understand that.

MR. PITTS: Excuse me. But it is the law that is going to determine whether or not, indeed, it was a legitimate or legal seizure.

MS. HARTMANN: I'll move on, Your Honor.

MR. PITTS: It is not the policy.

BY MS. HARTMANN:

Q Just, were you required to obtain a seizure warrant?

A No ma'am.

Q What is the procedure for seizing a car?

A When probable –

MR. PITTS: That's been asked and answered.

THE COURT: Overruled.

BY THE WITNESS:

A When probable cause exists to seize a vehicle, we are [p. 61] mandated to seize the vehicle.

Q And what do you do when you go to seize a vehicle?

MR. PITTS: That's objectionable, Your Honor. We are concerned about what happened on this particular day, the 23rd namely, as it relates to the car and Mr. Cochran.

THE COURT: Overruled.

BY MS. HARTMANN:

Q What do you do? Do you give the property owner notice that you are seizing the car for forfeiture purposes?

A Yes. Current policy and policy at the time of February 23rd, mandated that we provide a notification of seizure to the possessor of the vehicle.

Q And on February 23rd, did you serve notice on the defendant that you were going to seize his vehicle for forfeiture?

A Yes, I did.

Q And what is the notice?What is the purpose of it?

A It explains the statute and basically shows the person the vehicle seized from, the legal avenues available.

Q To the property owner?

A Yes.

Q Or the suspected property owner?

A Correct.

MS. HARTMANN: Your Honor, may I approach the witness?

THE COURT: Yes.

[p. 62] BY MS. HARTMANN:

Q Agent Crock, I'm showing you what has been marked for identification as Government's Exhibit #1. Could you identify that, please?

A Yes. It is a notice of seizure of a conveyance for a drug related offense.

Q And was that the notice served on the defendant?

A Yes, it was.

Q And how do you know?

A It bears my signature, the address, description of the vehicle.

Q Did the defendant sign the notice?

A No, he did not.

Q And was that because you didn't give it to him?

A No. He refused to sign it.

MS. HARTMANN: Your Honor, I'd move for admission of Government's Exhibit #1.

THE COURT: Any objection?

MR. PITTS: I would just respectfully ask the Court to defer its ruling until cross examination has been completed.

THE COURT: All right. I'll take it under advisement.

BY MS. HARTMANN:

Q After a car is seized for forfeiture, is it routine, DEA policy and procedure to inventory the contents of the car?

[p. 63] A Yes, it is.

Q And what is the DEA policy and procedure in terms of inventorying cars that are seized for forfeiture?

A All cars seized are to be inventoried.

Q And what is to be inventoried?

A The vehicle and all its contents.

Q The entire vehicle?

A Yes.

Q Does it include all containers?

A Yes, it does.

Q And is that a written policy?

A Yes, it is.

Q When did you first see the defendant on February 23rd?

A As he drove the 1986 Volvo down the drive of the condominium complex on Aspen Ridge.

Q Did you see him on foot at all outside of his condominium?

A No, I did not.

Q And what did you do when you saw him driving away in his car?

A Myself and three other agents stopped him and detained him at the – and I seized the vehicle at that time.

Q And was that the car that you had gone to seize for forfeiture?

A Yes.

Q And that is the 1986 Volvo?

[p. 64] A Correct.

Q Prior to seizing the car, did you and any other members of the search team conduct surveillance on the defendant's condominium?

A Yes.

Q Why is that? Why didn't you go right in with the search warrant?

A It was decided by the people on the street that day that the safest approach was to detain Mr. Cochran outside the residence.

Q Why was that in this particular case?

A Basically, there were several factors. One is, we were aware that there was a large dog inside the residence, Mr. Cochran's criminal background, and the construction of the condominiums there.

Q What was it about the construction or the layout of the condominiums that led to your decision to wait till he left?

A They were all units joined. There were several units in one strand, or whatever you want to call it, within the complex, and the construction of the units, the individual units was in such a way that it was – would be considered dangerous to make an entry under those circumstances that I mentioned before.

Q So based on your experience with the DEA in executing search warrants, did that, that posed a particular danger in [p. 65] this case?

A Yes, it was, and there was really no, no reason to go ahead and execute it upon arrival either. It was, we were able to wait and do the safety precautions and the other implications that I mentioned, we waited, and the supervisor at the scene made that decision.

Q Did you know if anyone else besides Mr. Cochran was present inside the residence when you saw him?

A No, we did not.

Q But you knew there was a dog in there?

A Yes.

Q And what happened when you stopped the defendant?

A He was detained and secured at that point and Special Agent Brandon from ATF searched the vehicle, the passenger compartment area quickly for weapons. We reassembled and went up to 6316 Aspen Ridge and with the help of Mr. Cochran's keys to the residence, we gained entry.

Q Did you leave the car where you stopped the defendant?

A No, we drove the car outside the condominium and made entry. We locked the car up out front.

Q Did you see Agent Brandon check the car for weapons?

A Yes, I did.

Q And did he find anything?

A He didn't find any weapons. He found a nine millimeter clip in the glove compartment.

[p. 66] Q And was that an unlocked glove compartment?

A Yes, it was.

Q At that point, what did you do?

A At that point that where we gained entry on the search warrant?

Q Well, when you stopped the defendant, you indicated he was detained?

A Yes.

Q Did Agent Brandon do that?

A There were three other people there besides myself. Agent Schmidt from ATF, Agent Brandon, myself and I believe Agent Buckel. We secured Mr. Cochran. Did the quick search of the vehicle and then Mr. Cochran was taken in another vehicle up to the condominium and we took the '86 Volvo up there also and secured it.

Q And at that time you went in to do the search?

A Yes.

Q And Agent Crock, after you – or once inside the condominium, is that when you gave the defendant notice of the seizure?

A We were there for a while before I provided him the seizure notice.

Q When you presented Government's Exhibit #1?

A Correct.

Q After you completed the search of the condominium, what [p. 67] did you do with respect to the car?

A After we gained entry, everybody was secured. I assisted in the search of the premises.

MR. PITTS: Judge, I think at this particular time it is sort of irrelevant and immaterial. Once the car has been, indeed, been seized, the basis for the motion lays or doesn't lay.

MS. HARTMANN: Your Honor, I'm just setting out the DEA policy in terms of their – I intend to – I anticipate testimony regarding an inventory search and I think that is relevant.

MR. PITTS: I'm not concerned about any of that. I am concerned about the seizure of the vehicle. I mean, once the car has been in the custody and control, whatever takes place, then, is either going to be legitimate or illegitimate, based upon the seizure.

MS. HARTMANN: Well, once the defendant challenges the stop and the search of the car, the Government is bound to explain why, what it did and why they did it.

THE COURT: If I hear Mr. Pitts correctly, the issue in dispute was their justification for seizing the car. I assume he will concede that following that, whether it was valid or not valid, they inventoried and they found what they found. There is no need to go into that.

MS. HARTMANN: Okay. If that is conceded, I –

[p. 68] THE COURT: (Interjecting) Mr. Pitts, do you concede that?

MR. PITTS: I would.

THE COURT: Okay.

MS. HARTMANN: Okay.

BY MS. HARTMANN:

Q Agent Crock, if the defendant had not been at Aspen Ridge –

MR. PITTS: Speculation, Judge. That is an iffy question. I mean, you start with that being.

THE COURT: Let's hear the question.

MR. PITTS: If.

BY MS. HARTMANN:

Q And the car had been there, would you have seized it for forfeiture purposes?

A Yes.

Q And was that, in part, based on surveillance conducted two days earlier?

A Yes.

Q And the other information known to the members of your search team?

A Yes, ma'am.

MS. HARTMANN: I have nothing further.

THE COURT: Cross-examine.

MR. PITTS: May it please the Court.

[p. 69] CROSS EXAMINATION

BY MR. PITTS:

Q Special Agent Crock, let me, if I may begin my questioning with the subject matter that were the last

series of questions. Or at least that which was the subject of the last series of questions, if the car had not been there, or if Mr. Cochran had not been there, you would seize it anyway, right?

A Yes, sir.

Q Okay. And if some other things had happened, you would have done that anyway, right? What happens, the point is is that if – that little small word, right? Right? And –

A (Interjecting) I don't know if I understand your question, sir.

Q The point is, is that if you had a heart attack that day, you couldn't have got up to go to work either, could you?

A Again, I don't understand your question.

Q What do you mean? You didn't understand, you did understand the Assistant U.S. Attorney's question, if, indeed, the car had been there, and Mr. Cochran had been there, not have been there, you would have seized it anyway, wouldn't you?

A Yes. That was my answer, yes.

Q But the point is is that if you hadn't got a, if you had a heart attack, you couldn't have got up, you couldn't have been out there to seize it, could you?

A It would have been difficult, yes, sir.

[p. 70] Q All right. In any event, getting back to this particular matter in hand, you were armed with certain

information that had been provided you by one of your fellow workers, correct?

A Yes, sir.

Q And the name George Reid has come up as being somebody supposedly that had been under investigation simultaneously or during the course of this investigation, correct?

A Yes, sir.

Q All right. There was a search warrant issued for George Reid's house, isn't that true?

A Several –

Q (Interjecting) As a matter of fact, there was no search warrant issued on the 22nd though, was there?

A Not that I'm aware of, no.

Q As a matter of fact, there was no search warrant issued on the 23rd, 24th and 25th of February, was there?

A No, sir, not that I'm aware of.

Q And this is the home where supposedly a kilo of cocaine has allegedly been delivered, isn't that correct?

A Um-hmm.

Q As a matter of fact, George Reid's house was not executed, or at least a search warrant was not executed out there until sometime this year, isn't that right?

A Yeah, again, my personal knowledge, yes, sir.

Q Well, you would know if the DEA was involved. He is a [p. 71] subject of your investigation, right?

A Yes.

Q So that there was a search warrant executed at George Reid's house, but it was sometime within the last sixty days, isn't that right?

A Yes.

Q And it wasn't in February or March, was it?

A Again, not that I'm aware of.

Q Okay. But if one of your fellow agents testified that, indeed, a search warrant was issued and executed, that would be incorrect, isn't that right?

A To my knowledge, yes, sir.

Q Okay. Fine. As a matter of fact, you have testified that one of that reasons why you waited for the man to get out of the house was the configuration of the complex dwelling structure, isn't that right?

A That was one of the reasons, yes.

Q And, of course, the other reasons, you didn't have any reason to rush on in there, did you?

A Correct.

Q I mean, would it be a fair statement to make that you discuss before you even execute the search warrant what the assignments and designate what the rules are going to be?

A Yes.

Q You sort of rendezvous and go over it like a military unit [p. 72] those things that are pertinent to the

execution successfully, anticipatory successfully of the search warrant, right?

A Yes.

Q Okay. And would it be a fair statement that the questions that I've asked, as well as those asked by my adversary – pleasant and, indeed, beautiful adversary as may be – relate to what you did prior to executing the search warrant, right?

A Would you repeat that, please?

Q Okay.

A I think I lost you in mid –

Q Well, in any event, you talked about the reasons why you waited for Mr. Cochran to leave, right?

A Yes.

Q And I think it is your testimony here – correct me if I'm not mistaken – on direct, that it was, indeed, the configuration, the construction, manner of the complex. There wasn't any rush to get in there, right? Right?

A Yeah, and two other factors, yes.

Q Okay. Excuse me. What other factors?

A The presence of the animal. The dog.

Q The dog. The dog.

A And Mr. Cochran's past criminal history.

Q Oh, it was Mr. Cochran's past criminal history. Is that something that stopped you from going in there, then?

A No, it was the combination of all four.

[p. 73] Q Okay. Did that play a part, Mr. Cochran's past history? How big of a part did that play?

A That was another factor.

Q How big of a part did it play?

A I can't answer that.

Q Okay. It was just a factor?

A Yes.

Q Okay. And it is your testimony here that after Mr. Cochran exited the unit in this particular vehicle and he was driving down the common road or the common complex road, that he brought it to a stop and you effectuated your arrest of him, is that correct?

A Yeah, we detained him at that point. Yes, sir.

Q You detained him. That would be synonymous with arresting him, wouldn't it?

A I didn't arrest him.

Q You were with somebody who stopped him.

A Right. We detained him.

Q All right. Fine. That would be synonymous with arresting him, right?

A We are going to be debating legal terms if you get into terms of that.

Q Well, I don't want you to debate a legal term.

A Yeah.

Q You certainly stopped him from going – you had your guns [p. 74] out, too?

A We detained him.

Q Would it be a fair statement to make you had your guns out because this was a dangerous fellow and this was a man that you had some reason to believe who always had a gun around?

A Yes.

Q So you stopped him with guns drawn?

A Yes.

Q All right. Fine. So that is a little bit more than just detaining him. You arrested him, didn't you?

A No.

Q All right. Fine. You didn't arrest him. You just detained him. All right. You got him out of the car. Then you proceeded to search the car, correct?

A Yes.

Q Okay. And Special Agent Brandon was the one who did that, right?

A Yes.

Q That is, search the car. Now, would it be a fair statement to make that you have indicated that you went out also and you were going to seize this vehicle, right?

A Yes.

Q And if I'm not mistaken, I think you have indicated to us on direct that you had to have probable cause

to believe that, [p. 75] indeed, a crime had been committed, is that correct?

A Yes.

Q Okay. Now, you are telling us, indeed, that you had the probable cause, and that probable cause was based upon what had been provided you by one of your fellow workers, isn't that right?

A Yes.

Q And correct me if I'm not mistaken, that probable cause was the observation of an alleged package being transported from that premises to somebody else's premises?

A That was part of it, yes, sir.

Q Well, you tell me what other part there is, what factually can you tell us would be the basis of getting, of seizing the car? What did you know for a fact, sir? Tell me what you knew.

A Okay. We had the surveillance of –

Q (Interjecting) What did you know that this car had been involved in on that particular day?

A I'm trying to answer that, sir.

Q Okay. Please, sir, do that.

A We had, I was provided the information of the observations –

Q (Interjecting) Listen, what did you know.

MS. HARTMANN: Your Honor –

[p. 76] BY THE WITNESS:

A I'm telling you what I knew, sir.

MR. PITTS: Well, he said he was provided information, didn't he, Judge?

MS. HARTMANN: –he is trying to answer the question.

MR. PITTS: No, he is not. He is giving me the collective wisdom or knowledge of some of the –

THE COURT: Well, that sometimes how we gain knowledge when you use that term, sir. He may answer the question. Proceed.

BY THE WITNESS:

A I was provided the information obtained from the surveillance. I was aware of debriefings by confidential informants of Mr. Cochran's involvement in the narcotics trade, and his prior criminal activities.

Q Okay. Now, you were aware of all these things that supposedly had been provided you by the narcotics informer, who probably was a drug addict, right? Who may have lied, or may not have lied, right? I mean, these informers, they are, indeed, those who are involved in that activity, isn't that correct? Generally speaking.

A I can't answer that, sir.

Q Well, you don't know who the informer was then do you?

MS. HARTMANN: Your Honor, I object.

[p. 77] MR. PITTS: Well, I think the Court, if this Court is going to rely upon that as being a part of the

probable cause, we have to get into it to see whether or not, indeed, there was something to be relied upon.

THE COURT: What is the question you want the witness to answer? I heard about four or five questions in a row. Ask one. Let's deal with it one at a time.

MR. PITTS: I didn't know that I had confused the Court. Reminds me of being paralyzed –

THE COURT: What question do you want – it is getting late, please.

MR. PITTS: I'm sorry, Judge.

THE COURT: Please.

MR. PITTS: I'm sorry.

THE COURT: Let's go. Question. What do you want answered?

MR. PITTS: I'm sorry. Maybe it is getting late.

THE COURT: Frame your question, please.

MR. PITTS: I'm trying to do so.

BY MR. PITTS:

Q Sir, I asked you what did you know, for a fact, to justify the seizure of this vehicle, and your response was, " Well, I'm relying upon information from other agents." Isn't that correct? DEA investigations, isn't that correct?

A Yes, sir.

[p. 78] Q And one of those things that you just testified to was supposedly some information that was provided by an informer, correct?

A Yes, sir.

Q Did you know the informer?

MS. HARTMANN: Your Honor, I'm going to object.

THE COURT: He may answer it yes or no.

BY THE WITNESS:

A Yes.

Q Okay. Did you know whether or not the informer had been involved in narcotic trafficking.

MS. HARTMANN: I am going to object to any questions that might, that are getting at the identify of the informant.

MR. PITTS: Excuse me. I'm not concerned about the identity of the –

THE COURT: I understand. You will not get into the identity. He may answer that last question.

BY MR. PITTS:

Q You know I'm not concerned about that, don't – you know that, too, Crock, don't you? I'm not concerned about the identity of the informant. You understand that?

A Yes, sir.

Q All right. Did you know whether he or she was a narcotic addict?

A No, sir.

[p. 79] Q Okay. Did you know whether or not he or she was involved in narcotic trafficking?

A Yes, I believe so.

Q And did you know whether or not he or she used narcotics?

A I have no knowledge of that, no sir.

Q So you don't know whether or not they are reliable, or whether or not they are addicted to any narcotics, do you?

A I didn't provide a drug test, if that is your –

Q (Interjecting) No, I didn't ask you that. I asked: You don't know whether or not they were addicted, so whether or not that addiction might have been some basis of irreliability.

A I have no idea.

Q Okay. In any event, the informer might have provided you with some information about supposedly some activities of Mr. Cochran, is that right?

A Yes.

Q Okay. And your investigation about Mr. Cochran's background personally and/or provided by other agents was part of that, is that right?

A Yes.

Q Okay. And would it be a fair statement to make that those things that we have just talked about, that is the observations of one of your fellow agents on the 21st of this package?

A Yes.

[p. 80] Q The alleged information from an informer, correct?

A Yes.

Q And the background that you have regarding Mr. Cochran's activities regarding, what, having been arrested, convicted of gun charges, correct?

A And other DEA investigations, yes, sir.

Q Well, tell me what this other DEA investigation that factually showed with reference to Mr. Cochran?

A That Mr. Cochran is a narcotics trafficker.

Q Well, listen, why didn't you go out and arrest him two days prior to that if he was a known narcotics trafficker? Why didn't you arrest him then?

A We had no probable cause to arrest him.

Q Fine. You had no probable cause prior to the 21st, is that what you are telling us?

A No.

Q Well, wait. You didn't arrest him on the 13th of January, did you?

A No, sir.

MS. HARTMANN: Your Honor –

MR. PITTS: Excuse me.

BY MR. PITTS:

Q Would it be a fair statement to make that you had that same information with the exception of the incident on February the 21st on the 13th of January?

[p. 81] A Again, I'm sorry, sir. Would you repeat that?

Q That's all right, sir. I'm going to repeat this question. You testified that you had some information, all of these sources, and you had it all prior to February the 21st, didn't you?

A Yes.

Q Fine. Why didn't you arrest him on February the 19th?

A We were trying or attempting to exhaust our investigation. At that point in time, it was an investigative discretion of the persons involved not to obtain an arrest warrant for his person.

Q Okay. And then on the 21st, likewise, it was the discretion of the person who was in charge in the investigation that, indeed, you wanted to continue your investigation?

A Now we are getting into the way the federal criminal justice system works. I don't know where you want to go with this.

MS. HARTMANN: Your Honor, I think he has answered –

BY MR. PITTS:

Q Well, I just want you to answer my question.

THE COURT: One at a time.

MS. HARTMANN: I object. I think he has answered the question. It was an investigative decision.

That should be the end of it. Anything else is getting irrelevant.

THE COURT: Well, I assume – and Mr. Pitts will [p. 82] correct me if my assumption is not correct – I am assuming he is inquiring as to what additional information he had on the 21st that he didn't have on the 19th. Is that where you are going?

MR. PITTS: That's basically it.

BY MR. PITTS:

Q What did you have on the 21st that you didn't have on the 20th or the 19th?

A The 20th and 19th of February, are you referring to?

Q I certainly am.

A Okay.

Q And let's just restrict it to the 20th.

A Okay. I was advised by other agents of Mr. Cochran's background and involvement in the narcotics trade.

Q Excuse me. My question was: What did you have on the 21st that you didn't have on the 20th? You were advised by your fellow agents sometime in January or February, weren't you?

A Oh, yes.

Q Okay. Fine. Now, what did you have on the 21st that you didn't have on the 20th?

A Surveillance implicating Mr. Cochran using that vehicle to facilitate a narcotics violation.

Q Okay. So you didn't have the activity of the 21st, is that correct?

[p. 83] A On that vehicle, yes.

Q In that particular vehicle?

A Correct.

Q That's the only thing that added to all the other information that you had, right?

A Correct.

Q Okay. Now, when you went out to execute the search warrant, it is your testimony here that you were going to seize the vehicle, correct?

A Yes, sir.

Q Okay. Had you prepared one of those seizure forms at the office before you went out?

A No, sir.

Q Well, you had ample time to do that there, didn't you?

A No, sir. I don't do it that way.

Q Excuse me, sir. Didn't you have ample time at the office to prepare that before you went out there?

A I don't do it that way.

Q But I didn't ask you how you did it. My question was: You knew you were going out to get the vehicle, right?

A Yes.

Q Fine. Then why didn't you prepare the form at the office?

A Because I normally don't do it that way. I prepared it at the same time the seizure –

Q (Interjecting) I didn't ask you what your normal [p. 84] practice was. Just why didn't you do it in this particular instance?

MS. HARTMANN: He asked him why –

THE COURT: I think he has answered it because it is not his normal procedure.

MR. PITTS: Well – fine. Fine.

BY MR. PITTS:

Q Having gotten that response, you went out there, going to seize the vehicle, and that vehicle was being seized on the basis of, again, the incident that happened on that particular day, that is the 21st, isn't that right?

A Yes.

Q Okay.

MR. PITTS: I have no further questions, Judge. Thank you.

THE COURT: Any questions, Ms. Hartmann?

MS. HARTMANN: No, Your Honor. I don't have any other questions.

At this time, if Mr. Pitts is done, I'd ask to excuse the witness.

MR. PITTS: I'm done.

THE COURT: The witness is excused.

(Witness excused)

END OF EXCERPT OF PROCEEDINGS

[p. 2] Testimony Transcript – June 29, 1990

Brandon-Direct

Detroit, Michigan

June 29, 1990

EXCERPT OF PROCEEDINGS

MS. HARTMANN: Your Honor, the Government calls Special Agent Thomas E. Brandon.

THE COURT: Please step forward and raise your right hand.

THOMAS E. BRANDON,
GOVERNMENT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MS. HARTMANN:

Q Agent Brandon, how are you employed?

A I'm a special agent with the Bureau of Alcohol, Tobacco and Firearms.

Q And how long have you been with ATF?

A Since January of 1989.

Q And prior to that, did you have any law enforcement background?

A I was a special agent with the Criminal Investigation Division for the Internal Revenue Service.

Q And on February 23rd of 1990, were you a member of the search team at 6316 Aspen Ridge in West Bloomfield, Michigan?

A Yes, I was.

Q And did you come in contact with an individual identified as Steven Cochran on that date?

A Yes, I did.

[p. 3] Q Do you see the individual Steven Cochran in the courtroom today?

A Yes, I do.

Q Could you point him out for the Court, please?

A White shirt and black sweater, a beard.

MS. HARTMANN: Your Honor, may the record reflect that the witness had identified the defendant.

BY MS. HARTMANN:

Q How did that contact with the defendant come about?

A We had a federal search warrant for 6316 Aspen Ridge, West Bloomfield. Prior to that, we had a surveillance set up. I was in a car with Special Agent Robert Schmidt. I was the passenger.

We were up inside the condominium complex and approximately at 1:35, we saw a white Volvo with Mr.

Cochran in it go past. We radioed to the other surveillance, members of the team, and they stopped Mr. Cochran and the vehicle before it left the condominium complex. We came behind the white Volvo and we got out of the car. We had a blue light on and our raid jackets and I went to the passenger side. Special Agent Schmidt went to the driver's side.

Q Were you the first two to the car?

A Yes.

Q And what happened as you approached the car? That being the Volvo.

[p. 4] A Special Agent Schmidt told Mr. Cochran –

MR. PITTS: That really is sort of leading, isn't it, Judge, what happened, assuming, of course, something did occur?

THE COURT: Overruled.

MR. PITTS: Certainly.

BY THE WITNESS:

A Special Agent Schmidt told Mr. Cochran, "Get our of the car."

Q Did he?

A He was saying something, which I couldn't distinguish, and I saw his right arm moving. Again, Special Agent Schmidt, he opened the door, said, "Get out of the car." I saw Mr. Cochran's right arm moving faster.

At that time, Special Agent Schmidt grabbed Mr. Cochran and pulled him out of the car. I opened the

passenger door, it was as Mr. Cochran was being let out of the car, I opened the glovebox real quick, and the nine millimeter magazine fell out with live rounds in it.

Then the car – Mr. Cochran was out. Special Agent Schmidt had him up on the back. The car started to roll a little bit and I leaned over and threw the transmission into park. And I told Special Agent Schmidt what I had found. He patted Mr. Cochran down for weapons and said, "He's unarmed."

Q Could you tell what the defendant was doing when you saw [p. 5] his right arm moving?

A No, I couldn't. I knew – I just – from the angle I had –

MR. PITTS: Excuse me. That's objectionable, Judge. He has answered the question. "No, I couldn't."

THE COURT: Overruled.

BY THE WITNESS:

A I saw his arm moving and I had knowledge prior to that that he had numerous arrests for carrying a concealed weapon in a motor vehicle. When I saw his right arm moving, naturally, I was alarmed, you know, in that he wasn't complying with what he was being told. And when I saw Special Agent Schmidt grab him, and him being led out of the car, my instinct, you know, open the door, and I naturally went for the glovebox.

Q And what were you checking for in the glovebox?

A I was checking for any type of gun.

Q And was the defendant completely out of the car when you went in and checked the glovebox?

A No. That was more of a simultaneous type thing where once I saw his hands on Mr. Cochran, and Mr. Cochran turned towards the passenger door, I reached into the glovebox, you know opened it up.

Q Was it locked?

A No, it was unlocked.

MS. HARTMANN: I have nothing further, Your Honor.

[p. 6] THE COURT: Cross-examine.

CROSS EXAMINATION

BY MR. PITTS:

Q Sir, you are Special Agent Brandon?

A Special Agent Brandon, yes, sir.

Q Okay. You were telling us about your experience and I think you indicated that prior to your coming with the AFT, or ATF, AFT?

A ATF.

Q That you worked in the Criminal Investigation Division of the Internal Revenue Department?

A Yes, sir.

Q As a law enforcement officer?

A Special Agent.

Q Was that as a law enforcement officer or was that –

A You enforce criminal violations of the Internal Revenue.

Q How long did you work there?

A For sixteen months.

Q Okay. So you have had approximately what, two years, three years at working as an agent in law enforcement?

A Two and three-quarter years.

Q All right. In any event, it is your testimony here that you observed these various activities on or about the 23rd of February, is that correct?

A Yes, sir.

[p. 7] Q And during the course of your training and, indeed, your own experience, you have learned that you reduce to writing those particular activities that you have participated in for further reference, isn't that correct?

A Could you repeat your question, sir?

Q Okay. Your training and experience has taught you, has it not, to reduce to writing your activities, a summary, that is, for either your supervisor and/or for your future reference, is that correct?

A Yes, sir.

Q Okay. The DEA or the AFT has – ATF has forms that you complete out, something like DEA 302s OR 6s, or something like that?

A No, sir. On this particular case, I was a participant. I wasn't the case agent and what ATF policy is, you

write a statement of your participation in that activity and that is what I did.

Q And you wrote such a statement?

A Yes, sir, I did.

Q Okay. And it is dated February what?

A Twenty-fourth, sir.

Q All right. Would you take a look at your statement, the original. Where is the original, incidentally?

A I believe the case agent has it.

MR. PITTS: May I see the original? Where is the [p. 8] original?

OFFICER THOMAS: It is in my case file.

(Brief pause)

BY MR. PITTS:

Q There is an original, is that what you are telling us?

A Yes, sir.

Q The original bears the same markings and et cetera as this?

A Yeah.

Q The People's Exhibit, or what they have alluded to, attached to their memorandum?

A Yes, sir.

Q And you made this statement on February the 24th. There is no question about it?

A That's correct, sir.

Q And you gave it to the case agent in charge?

A Yes, sir, I did.

Q That's Special Agent Thomas?

A That's correct.

Q Who has been here every day of this hearing. Did you know that?

A I knew Special Agent Thomas had hearings going.

Q And Special Agent Thomas had, indeed, the responsibility of getting and gathering all the information necessary for the progression or, at least, the prosecution of his case, correct? [p. 9] Correct or not? Did he have, as that particular role as the agent in charge, the responsibility of gathering the material necessary for the prosecution?

A Yes, sir.

Q You gave it to him, right?

A Yes, sir.

Q You mean to tell me, it is only today that this matter has been brought to the Court's attention through the Assistant U.S. Attorney?

A I was notified today.

Q I didn't ask you about the notification. I asked you, it is today, today, for the first time, this information was brought to the Assistant U.S. Attorney's attention, is that what you are telling us?

A Sir, I can't comment on what has been brought to the agent.

Q Sir, did you have a meeting with Special Agent Thomas yesterday?

A No, sir, I didn't.

Q Did you meet with him Monday?

A No, sir.

Q Have you talked to him at all this week?

A This morning, sir.

Q Did you talk to him prior to this morning?

A Concerning what?

[p. 10] Q Sir, just listen to my question. Sir, did you work Monday?

A Yes, sir, I did.

Q Did you work Tuesday?

A Yes, sir.

Q Isn't it a fact, then, that you wanted to know what was going on in the case Special Agent Thomas was involved with, because you had an involvement?

A Ah, he said –

Q (Interjecting) Listen to my question. Don't you have a natural interest?

MS. HARTMANN: Your Honor, I think –

MR. PITTS: You hesitate –

THE COURT: Mr. Pitts –

MR. PITTS: Well, he seems – I'm sorry. I'll stop.

THE COURT: Okay.

MR. PITTS: I understand.

BY MR. PITTS:

Q You worked every day this week, have you not?

A Yes, I have.

Q One of your fellow agents is involved in a rather significant case, is he not?

A Yes, sir.

Q And you were involved with it, are you not?

A Yes, sir, I am.

[p. 11] Q You haven't had any discussions with him Monday, Tuesday, Wednesday, Thursday and Friday about this particular case until today?

A That's correct, sir.

Q Not at all?

A Can I answer –

Q Yes or no.

A – with an explanation?

Q If the Court wants your explanation, I guess we are going to get it. I don't want it. You didn't talk to him about it Monday, did you?

A Sir, I was at work –

Q (Interjecting) I didn't ask you where you were, sir. I said you didn't talk –

MS. HARTMANN: (Interjecting) Your Honor, let him answer the question.

BY MR. PITTS:

Q Go ahead.

A I did work Monday, Tuesday. I've worked every day this week, but have worked on unrelated stuff which has kept me out of our office and not in contact with Special Agent Thomas.

Q I understand. And you haven't seen him at all this week until today?

A I have seen him and it was only in passing and I have never discussed his cases. More of just formality.

[p. 12] Q So you have seen him this week?

A Yes, as far as "hi" and –

Q (Interjecting) I didn't ask that. I didn't ask what you did. You have seen him?

A Yes, I have.

Q You haven't made any inquiry, though, during the times that you saw him prior to yesterday or today?

A No.

Q Okay. Fine. As a matter of fact, you were working this week, who with, incidentally?

MS. HARTMANN: Your Honor, objection. Is that relevant to these proceedings?

MR. PITTS: Well, she brought him in, Judge. This is cross examination and while I'm not that concerned about really – and maybe I shouldn't say that about the statement –

THE COURT: I'll sustain the objection.

BY MR. PITTS:

Q Okay. Getting back to the heart of the matter, is your testimony here that you were doing surveillance sometime in the afternoon along with special Agent Schmidt, is that correct?

A Yes, sir.

Q And you saw the defendant's vehicle leave the premises?

A Yes, sir.

Q Okay. Where was it parked before he left the premises?

[p. 13] A He was parked in the driveway of 6316 Aspen Ridge.

Q He was parked in the driveway?

A In front of the condominium complex.

Q You didn't see the car come outside of the car, I mean, outside of the garage?

A No, sir. The –

Q (Interjecting) I just asked you: Did you see it come out of the garage?

A No, sir.

Q All right. You saw the car leave the driveway?

A Yes.

Q You saw the defendant apparently come out of the home and get into the driveway, or get into the car?

A No, I did not see that.

Q You didn't see it? You don't know how he got into the car, and when, is that what you are telling us?

A I'm telling you I saw him pass in front of me in the car.

Q But you saw the car parked in the driveway. You didn't see the car start up and come down the driveway?

A No. I passed by the house and then set up an observation where I didn't have directly, I could directly view the front of the condominium. But being that there was only one way out, I took a position where, if he did come out the, was leaving the complex in his car, he would have to pass by in front of us.

[p. 14] Q In any event, you followed the car as it came out of the area where it had been parked, is that correct?

A Yes.

Q And then you brought the car to a halt after radioing your, simultaneously with radioing your counterparts, right?

A That's correct.

Q And you were the first two individuals, you and Schmidt, to the car that had been stopped?

A Yes.

Q You turned on your insignias and you went out to stop and arrest the man, right?

A I put up our blue light on the dashboard.

Q You got out of the car to arrest the man, did you not?

A No.

Q Well, listen. When you got out of your car, you got out because you were going to ask the man for his driver's license and check him out for verification of ability to drive the car?

A No, sir.

Q You got out with your guns drawn, didn't you?

A Yes, sir.

Q Well, were you just going to frighten him when you got out of the car?

A No, sir.

Q Well, you stopped the car, didn't you?

A Yes, sir.

[p. 15] Q You got him because you were going to take the car in?

A No, sir.

Q Well, you aren't going to seize the car, you aren't going to arrest him. Why did you run up to the car? Why did you stop him?

A We had a federal search warrant for the condominium where he was residing. And the decision was made by our supervisor that instead of knocking and announcing, with the known possession of firearms by Mr. Cochran – and we did have knowledge there was a Doberman Pincher inside – that the easiest way of doing it and without anyone getting hurt, agents or people inside, was to wait for him to leave and stop him as soon as possible from leaving the condominium. Tell him we had a federal search warrant. Bring him back and go in and execute the warrant.

Q That's what your supervisor told you to do?

A That's correct.

Q Who was your supervisor?

A James Colburn.

Q And is that all that your supervisor told you to do?

A Yes, sir.

Q Now, just briefly here, when you approached the vehicle, you went to the passenger side and the other fellow, Mr. Schmidt, went to the driver's side, is that correct?

A That's correct, sir.

[p. 16] Q And you said that he was ordered out of the vehicle by the other fellow, Mr. Schmidt?

A That's correct.

Q You were at the passenger's window, side door?

A Yes.

Q And you look in the car and you can only see the defendant, right?

A I was to the passenger side and to the rear.

Q You were to the rear, but you saw his right hand moving supposedly?

A Yes, sir.

Q But you don't know what it was doing, isn't that right?

A That's correct.

Q I mean, obviously, if you don't know what it is doing, it certainly is not going over to the glove compartment in your view because you didn't testify to that, did you? Listen to the question. I don't want to confuse you. Remember you testified on direct examination, you saw the right hand moving but you don't know where it was going?

A That's correct.

Q Obviously, if you are in the back looking in the car, you got a clear shot, you can see if it is going towards the glove compartment, can't you?

A No, sir.

Q Yes, sir. Can't you – excuse me.

[p. 17] MS. HARTMANN: Your Honor, he answered the question.

BY MR. PITTS:

Q Did you see an obstruction – I'm sorry. You didn't see the hand going, you didn't know where it was going, right?

A That's correct.

Q And you didn't see it go anyplace, did you?

A I just saw a lot of movement with his –

Q (Interjecting) My question was not what you saw regarding the movement. Did you see it at the glove compartment door?

A No.

Q Did you see it at the glove compartment edge?

A No.

Q You didn't see it anywhere near the glove compartment because you have indicated you don't know what it was doing, isn't that right?

A Sir, the view I –

Q (Interjecting) I didn't ask you about the view. I just asked you, you didn't see it at the glove compartment area, did you?

A No, sir.

Q And what you are telling us, then, because you are stopping the guy – and really, you are concerned about your protection, isn't that true?

A Sure.

Q I mean, you are concerned about your safety and the [p. 18] welfare of you and your fellow officers. There is no question about it, isn't that right?

A That's correct.

Q So when the guy gets out of the car, what you are going to do is anything that is available so that you can protect yourself, isn't that right?

A Anything that is reasonable.

Q Anything that is reasonable. Anything that may be accessible, isn't that right?

A We protect ourselves –

Q (Interjecting) I didn't ask you about "we." I said – you have got the man and you are taking him out of the car, right?

A That's correct.

Q You are trying, and you, indeed, are effectuating an arrest at that point, isn't that right?

A No, sir.

Q You aren't arresting him?

A No, sir.

Q Even though your guns are drawn and you are ordering the man out of the car, you are not arresting him?

A That's correct.

MR. PITTS: I don't have any further questions, Judge.

THE COURT: Any questions?

[p. 19] REDIRECT EXAMINATION

BY MS. HARTMANN:

Q From your vantage point when you saw the defendant's right arm moving, could you see where his hand was going?

A No.

Q But you could see a lot of movement?

A Yes.

Q And based on your experience, where does an individual who is a driver in a car have access to weapons?

MR. PITTS: That's objectionable. She knows – I'm sorry.

THE COURT: What is your question?

BY MS. HARTMANN:

Q What areas of the passenger compartment would the driver of a car have access to?

MR. PITTS: That's objectionable, isn't it, Judge? I mean, what we are concerned about is what he saw and what he did and not what supposedly is in the mind or what customarily happens and what is accessible and et cetera under normal circumstances.

THE COURT: Overruled.

BY MS. HARTMANN:

Q Do you need me to repeat the question?

A If you would, please.

Q Based on your experience, what areas would the driver of [p. 20] a vehicle, what areas in the passenger –

MR. PITTS: (Interjecting) That is irrelevant and immaterial, then, Judge.

THE COURT: Overruled.

BY MS. HARTMANN:

Q What areas of the passenger compartment would the driver have access to, or potential access to, in your experience?

A A glove compartment or under seats.

Q And after you saw the movement by the defendant and his right arm, what areas did you check?

A It was an instinct reaction when I saw his arm moving and then when I saw him being grabbed and being out of the car, it was simultaneous as Special Agent Schmidt grabbed Mr. Cochran, I popped open the passenger door. Granted, it was a small car. Everything was easy reach, if there was anything. When we were doing this, mentally, I had in my mind, here is a person who –

MR. PITTS: (Interjecting) That is objectionable, Judge. There is no question on the floor and, you know, it is a narrative now with reference to supposedly what he is thinking about. That is irrelevant and immaterial.

MS. HARTMANN: I think that he is answering the question, Your Honor. I'll ask another question.

THE COURT: Okay.

[p. 21] BY MS. HARTMANN:

Q Based on your experience, what were you doing and what did you believe might be happening when you saw the defendant's arm moving?

A When I saw his arm moving, at that time, I believed he was reaching for a weapon, particularly a gun, given what I was told that he was arrested on numerous times for carrying a concealed weapon in a motor vehicle.

Q And the first time that you, you saw the defendant shortly before the stop, he was already in his car, is that –

MR. PITTS: (Interjecting) That is objectionable. It is leading.

THE COURT: Overruled.

BY THE WITNESS:

A Yes, he was driving his car.

MS. HARTMANN: I have nothing further, Your Honor.

MR. PITTS: Just a brief question, with the Court's permission, regarding that hand.

RECROSS EXAMINATION

BY MR. PITTS:

Q Does the car have two or four doors?

A That car had four doors.

Q You don't know that the man wasn't reaching for the door to let you in, do you? Do you?

A No, I –

[p. 22] Q Sir, do you know whether or not the man was reaching for the door to let you in?

A No, I didn't see –

Q Do you know whether or not he was reaching for the door to get out?

A His hand –

Q (Interjecting) My question to you is –

A – I assumed –

Q Now, you don't know what he was doing, do you?

A No, sir, I don't.

Q Fine. I mean, you have answered a number of questions by the Assistant U.S. Attorney thinking, or at least, giving a response to what you thought might have occurred, correct? But you don't know what he was doing, right?

A That's correct.

Q So what you thought is not limited to what may have been done, because somebody else might by thinking differently, isn't that correct?

A Yes.

Q Now, he might have been going for the door to escape, isn't that true?

A That's –

Q I mean, people try to escape from you, don't they?

A That's possible, yes, sir.

Q Even with guns drawn, don't they?

[p. 23] A Yes, sir.

Q You don't know whether or not he was trying to lower the window so that he could talk to you, do you? You don't know whether or not he was doing any of these innocuous or innocent things, do you?

A No, I don't, sir.

Q That meaty thing that you think about as a police officer, though, is, "Listen, I saw a hand moving. I don't know where it was going. I got to think that, listen, my life is in danger." Is that what you are telling the Court?

A Yes.

Q And you don't even see a gun, do you? You don't see a bomb, do you? You don't see anything that is threatening to you at that particular point, do you?

A No, sir.

Q You just working on that mind, isn't it? It is that mind that's functioning that causing you to do things like this, isn't it?

A (No response)

MR. PITTS: I don't have any further questions of this man. Thank you.

THE COURT: Any questions?

MS. HARTMANN: No further – no.

THE COURT: You may step down. The witness is excused.

[p. 24] (Witness excused)

THE COURT: That concludes the hearing, I take it?

MS. HARTMANN: Yes, Your Honor.

END OF EXCERPT OF PROCEEDINGS

****

STATE OF MICHIGAN

COUNTY OF WAYNE

I, Madonna Anton, Official Court Reporter, certify that the foregoing is a correct transcript excerpt from the record of proceedings in the above-entitled matter.

MADONNA ANTON, CVR, CM
Official Court Reporter
United States District Court
Eastern District of Michigan
211 U.S. Courthouse
DETROIT, MI 48226
(313) 965-5732

Detroit, Michigan

Dated: August 7, 1990

[p. 8] * * *

THE COURT: Let's deal with the motions that have been filed.

MS. HARTMANN: Thank you, Your Honor.

MR. PITTS: I would like to have the witnesses sequestered, with the exception of the officer who is testifying and the officer in charge of the case. If, in fact, indeed, the officer in charge of the case is going to testify, I would like to have him put on first.

MS. HARTMANN: He is not going to testify at this point. I am not planning on calling him.

MR. PITTS: Sure.

THE COURT: Any witnesses who expect to testify remain in the hall until such time as you are called to testify.

MS. HARTMANN: Your Honor, the government calls Officer Gerard Biernacki.

****OMISSIONS****

(ALL TESTIMONY TRANSCRIBED IN A PREVIOUS VOLUME)

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THE COURT: The witness is excused.

(Witness excused)

MS. HARTMANN: I would ask – I was going to call one other witness regarding the inventory search of the vehicle but if that is no longer in issue, at this time I just would

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[p. 2] Pre-Trial Motion Transcripts – June 27, 1990

Detroit, Michigan
June 27, 1990
2:16 p.m.

****PROCEEDINGS****

THE CLERK: Criminal Action No. 90 80170, United States versus Steven Fletcher Cochran.

MS. HARTMANN: Good afternoon, Your Honor. Amy Hartmann on behalf of the United States.

MR. PITTS: I wish I could say it as softly and pleasantly as her.

Good afternoon, Your Honor. Cornelius Pitts appearing on behalf of the defendant.

THE COURT: Okay. Anything other than argument for today?

MS. HARTMANN: No, Your Honor.

THE COURT: Let's proceed with the arguments.

MR. PITTS: I yield.

MS. HARTMANN: Your Honor, on February 23rd, the agents, members of DEA and what is known as OCDETF, The Organized Crime Drug Enforcement Task Force, came to 6316 Aspen Ridge with a search warrant that was issued by the United States magistrate upon a probable cause finding that the defendant was suspected of being involved and engaged in the trafficking of narcotics.

They go there and like reasonable officers and [p. 3] agents, they station themselves outside. And based on prior surveillance and the knowledge that there was a Doberman-type dog inside of the house, based on their knowledge that the defendant is a dangerous individual, based on his prior convictions involving carrying concealed weapons, based on their knowledge that the defendant was stopped in 1987 with the individual to whom he delivered the kilo size package in, upon a stop after receiving information that these individuals were about to do a drug hit, they decide to wait outside to secure the premises on February 23rd for the search. They

see the defendant coming out of an attached garage. That's the first time they see him because of the physical layout of the condominium complex and they stop him.

All this is is what the Supreme Court has authorized in *Michigan* versus *Summers,* and that is that the agents or officers with a search warrant to search the residence can stop and detain and require the occupant of that residence to re-enter to conduct the safe, a safe search of the premises.

And in this particular case, unlike in *Summers* where there was no articulable basis in the record for believing that the individual was particularly dangerous, in this case, we have more than ample evidence in this record to support and sustain the officers' reasonable belief that this defendant might be armed and might have access to weapons.

We heard testimony that the agents had information [p. 4] from informants that he always carried a gun with him and based on that, they pull over the car and they require him to re-enter the premises.

At that point, also, under *Michigan* versus *Long,* the agents are entitled to do a protective sweep of that car for weapons. *Michigan* versus *Long* authorizes it, the 6th Circuit in *United States* versus *Hardnett* authorizes, at 804 F.2nd, which is in the Government's brief. Basically, what it is, is a *Terry* stop and frisk of a car, which the Supreme Court has authorized for roadside encounters.

THE COURT: In what case?

MS. HARTMANN: *Hardnett,* and that's the 6th Circuit Case following *Michigan* versus *Long.*

Again, just in February of 1990, in *Maryland* versus *Buie* and that is, at this point, just in the Crim Law Reporter, and I can provide the Court with that cite. But that is the recent case about protective sweeps.

THE COURT: Name of the case?

MS. HARTMANN: *Maryland* versus *Buie.*

THE COURT: Date of the case?

MS. HARTMANN: February 28th of 1990. And that case, the Supreme Court again reaffirms the whole rationale. In that case it was going in, they had an arrest warrant and the Supreme Court authorized protective sweep of the house for weapons. But in that opinion, the Supreme Court again [p. 5] reaffirmed the rationale in *Michigan* versus *Long* that *Terry* stop and frisks of cars are permissible when there is articulable basis for believing that the individual is potentially armed and dangerous, and in this case, we certainly had that.

Not only because of the defendant's –

THE COURT: Excuse me.

MS. HARTMANN: Yes.

THE COURT: Where was the defendant in this case when the protective search, as you call it, took place?

MS. HARTMANN: He was at the side of the car. The testimony, I believe, was that a couple agents were getting him out of the car as another one went in and did a quick cursory search for weapons.

THE COURT: What did they find?

MS. HARTMANN: They found a loaded clip inside the unlocked glove compartment and that is a place that is reasonable to conceal weapons. They did a quick search simultaneously with getting the defendant out of the car and once the officers found that loaded clip, knowing that this defendant was a previously convicted felon, that in itself is a federal crime. That in itself is probable cause under *United States* versus *Ross* to search the entire car.

THE COURT: Okay. Go slow. What is it that gives the probable cause?

MS. HARTMANN: Once they found a clip, a magazine [p. 6] with ammunition in it that fit a gun, at that point, the *Terry* stop and frisk ripens into probable cause to believe that that car contains the remainder of the firearm or firearm parts.

Additionally, in itself, the clip constitutes a crime because it contained ammunition and that is a federal crime for a previously convicted felon to possess that ammunition.

THE COURT: Okay. Back up a second. What case do you say supports your position that the finding of the clip created the probable cause justifying the more extensive search?

MS. HARTMANN: *United States* versus *Ross*.

THE COURT: Okay.

MS. HARTMANN: Which stands for the general proposition that once there is probable cause to believe that there is contraband in the car, that justifies a search of the car, the trunk, the containers therein.

THE COURT: What is the contraband in this case?

MS. HARTMANN: Firearms.

THE COURT: But they didn't find a firearm.

MS. HARTMANN: They found ammunition.

THE COURT: Okay.

MS. HARTMANN: And a clip that fit a firearm.

THE COURT: I understand. What law, statute or case, do you have to support the statement that I believe you [p. 7] made, and that is, the possession by the defendant of that clip is a violation of the law. I think you said that, didn't you?

MS. HARTMANN: Right. That is 18 United States Code, Section 922(g)(1).

THE COURT: And can you just paraphrase what it says?

MS. HARTMANN: Yes. That prohibits an individual who has been convicted of a crime punishable by a term exceeding one year, a felon, from possessing either firearms or ammunition.

THE COURT: Thank you.

MS. HARTMANN: Okay. So we have what started as a *Michigan* versus *Summers* stop to try and conduct a safe search. He had testimony about the physical layout of the condominium complex which made it conducive to the barricaded gunman type of situation and to danger of stray bullets. We had testimony that

there was a dog in there. We had testimony that the agents didn't know who was in there, but they did know that the defendant's car – or they didn't know the defendant's car was there at that time, but they knew the defendant resided there.

They knew that the defendant had a history of gun possession and based on all of that, they are going to wait until the defendant comes out. And the first time they see him, because he is in an attached garage, he is coming out of the residence in his car, they stop him. That is when they [p. 8] find the clip. Then they secure the vehicle. They go inside. They conduct the search.

THE COURT: At that point, would you not concede that their justification for the more extensive search was not protection? In other words, this was not a protective search at this point because they had protected themselves by taking him out of the car.

MS. HARTMANN: After they find the clip, Your Honor, and they have moved the car and locked it, I would agree that at that point the justification for the search becomes probable cause.

THE COURT: And that's the presence of the clip?

MS. HARTMANN: That's correct.

THE COURT: Go ahead.

MS. HARTMANN: And, but independent of all of that, we had testimony that that car was going to be seized whether the defendant was there or wasn't there because pursuant to 21 USC Section 881(b)(4), Agent Crock, as well as other agents of the DEA, are authorized

to do a warrantless seizure of a conveyance if it is not real property, and this was not real property. It was a mobile conveyance, a car. They are entitled under the statute if there is probable cause to believe that that automobile had been used in violation of Federal Controlled Substances Act.

THE COURT: And what do you believe was the testimony [p. 9] in this case that created the "probable cause" justifying the DEA in making that seizure?

MS. HARTMANN: Okay. In this case, we had a search warrant that was issued upon a probable cause finding by the magistrate that was based on the same information that justified the seizure of that car under 881(b)(4). And that is, informant supplied information that the defendant was a drug trafficker and was supplying for what is known as the People's Organization, and we had testimony about that. A large scale narcotics distribution ring suspected of an ongoing pattern of violations of the Controlled Substances Act.

We had information from the informant, or the agent had information, and we had, the agent who received that information from the informant, Officer Biernacki, testify about all the background on Steven Cochran that he had received from the informant, as well as information that he had obtained in his investigation regarding George Reid, who was a known drug trafficker and supplier for the People's Organization.

And there is information in the search warrant from other informants about Steven Fletcher Cochran. And additionally, we have got Officer Biernacki – we don't just have Officer Biernacki's hearsay account of the

informant testimony as in a case that was cited in the Government's brief, *United States* versus *Kemp*, which justified a warrantless seizure of a car. That is a 4th Circuit case.

[p. 10] But we have Officer Biernacki corroborating. We had information that the defendant was storing narcotics at his suburban residence. We have information corroborating that he is residing in West Bloomfield at Aspen Ridge.

And then we have the first-hand account of the surveillance on February 21st of 1990, when Officer Biernacki observes the defendant take what appeared to him, in his seventeen years experience, because of the method of packaging and the size and the shape of the packaging and the method that the defendant was concealing that package as he took it out of Aspen Ridge and then placed it into the trunk of the Volvo, drive directly to Avon, for which that information led to another search warrant for George Reid's residence on Avon.

And the defendant, at that residence, takes the package, the same package out of the trunk, looks up and down the street, runs it into Avon Street and soon after the agents see the defendant leave empty handed and they see a few minutes later Reid leave.

THE COURT: You would agree, would you not, that the Detroit police would, based on all of that information that you have articulated, would not have had the authority to make a warrantless search of that vehicle?

MS. HARTMANN: I think they would have had under – the Detroit police, at that point, could have

conducted a stop, but they didn't, because of the ongoing investigation. [p. 11] And at that point, they, the DEA would have authority under 881.

THE COURT: That is not my question. That is not my question. You will concede, will you not, that the Detroit police would not have had authority to conduct a warrantless search of that vehicle?

MS. HARTMANN: I wouldn't concede that, Your Honor.

THE COURT: What authority could –

MS. HARTMANN: (interjecting) Based on all of the information that they had, in terms of probable cause, it wouldn't have –

THE COURT: Are you saying that if they found that car – let's assume it is parked.

MS. HARTMANN: Um-hmm.

THE COURT: That the police would have had a right to go right into that car and start searching?

MS. HARTMANN: If it was parked, no.

THE COURT: All right.

MS. HARTMANN: No.

THE COURT: Okay. And they wouldn't have because the law would require that they get a search warrant, correct?

MS. HARTMANN: If there is no exigency involved, yes, Your Honor.

THE COURT: Okay. And that is because we believe in this concept of some neutral magistrate stepping between the [p. 12] police agency and society to make sure we don't just on the belief of a law enforcement agent, no matter how good faith it is, that they don't start searching –

MS. HARTMANN: That's correct.

THE COURT: Okay. But you are telling me, I guess, under the law, that even though the police, with all that information, could not have made a warrantless search of that car, the DEA, with that same information that would not justify a warrantless search, has a right to pick it up, seize it, take it and search it?

MS. HARTMANN: Well, because in this situation, the automobile exception doesn't necessarily apply because it is probable cause whether to believe that that automobile had been used in violation of the Controlled Substances Act.

If this car had been parked and was off somewhere, then there was no exigency in terms of the automobile exception.

THE COURT: Is there an automobile exception to the DEA seizing the car?

MS. HARTMANN: No. For that, that would be under Section 881(b)(4).

THE COURT: Well, that is what I'm saying. You are saying to me, are you, that even though this, if this car were parked, no exigency circumstances, even though the Detroit police, who had all this information, they wouldn't be able to [p. 13] go to that car and start

searching without a search warrant, but the DEA agent who is standing next to them can say to them, "Don't worry about it, I'm seizing. And now I cannot only search it, I can take it away from that person, and then of course we will conduct an appropriate inventory search after we take it" – on that same information.

MS. HARTMANN: Well, in the hypothetical where the car is parked and there is no exigency and the person is nowhere around, then I think that is different than the situation we have, particularly since under the statute 881 and the case law under that, specifically the *United States* versus *Kemp* case that I've cited to the Court, the case law is that the statute does not require the exigency to be involved, unlike an automobile.

THE COURT: That is what I'm saying. The exigency is irrelevant, you are saying, to the DEA.

MS. HARTMANN: Exactly. Exactly.

THE COURT: So I'm saying –

MS. HARTMANN: Right.

THE COURT: – that even though the police couldn't go into the car to even search it, with the same information that the police had, a DEA agent who is standing next to the police officer, says, "You can't go into that car. I can. Not only can I go into it, I can take it."

MS. HARTMANN: But this wasn't an on-the-field [p. 14] decision. The way the events transpired is that information was supplied to the affiant of the search warrant who obtained a federal search warrant. Based on all of that information –

THE COURT: Not for the car.

MS. HARTMANN: Not for the car, no.

THE COURT: That is all we are talking about is the car.

MS. HARTMANN: That is correct, but in terms of – it wasn't a situation where there was a police officer standing there and a DEA officer, agent standing there. This agent went out with the search warrant after a probable cause determination had been made by a United States magistrate, based on the same information.

THE COURT: No. That magistrate never said anything about the car. That magistrate never, never authorized the search of that car.

MS. HARTMANN: There wasn't a search warrant for the car, but what I'm telling the Court is that the same information that was available to Agent Crock, as observed by Officer Biernacki, the day previously, was the basis for the search warrant. It is not like Officer Crock just decided, "I'm going to seize the car." A probable cause determination had been made based on that same information for the house, but it was focused in large part on the events that had transpired with respect to that car on February 21st.

[p. 15] THE COURT: Why is it important that the magistrate issue the warrant? Why is it important with regard to the DEA agent's decision to seize it?

MS. HARTMANN: I don't –

THE COURT: Doesn't he make his decision based on information he possesses?

MS. HARTMANN: Yes.

THE COURT: Independent of whether a magistrate issued a warrant or didn't issue a warrant?

MS. HARTMANN: That's correct. And the statute, it doesn't this case doesn't rise or fall on that. But I think it is interesting to note that in terms of, you know, any allegation that this was some kind of a pretext, I mean, a probable cause determination had been made in large part regarding what happened on February 21st with respect to that 1986 Volvo. The statute doesn't require it, it doesn't require a magistrate to make that determination. The statute doesn't require an exigency to be present and the statute does not require that the seizure occur immediately. None of that is required.

But in this case, it was present and for those reasons, it makes Agent Crock's actions even more justified under the statute, him bringing out that notice of seizure, which was consistent with 881(b)(4) and the defendant has never contested forfeiture of that car through administrative [p. 16] proceedings.

THE COURT: Yesterday you offered an exhibit and at Mr. Pitts' request, I took it under advisement until he could have an opportunity to examine the witness, and I don't think we ever ruled on it.

MS. HARTMANN: I don't. I would request that the Court admit that into evidence.

THE COURT: Any objection?

MR. PITTS: That was the exhibit regarding –

MS. HARTMANN: The notice of seizure.

MR. PITTS: That was filled out at the house?

MS. HARTMANN: That's right.

THE COURT: All right. That is admitted. Do you have that exhibit?

MS. HARTMANN: Yes.

(Government's Exhibit #1 admitted)

MS. HARTMANN: Basically, Your Honor, I would just conclude by, in summary, stating that we have three theories going on here. We have a *Michigan* versus *Summers* stop and detention pursuant to a search warrant that was issued. And we have reasonable actions by the officers dealing with a known armed and dangerous individual that they take him back to the residence to try and get the dog under control, to try and prevent any stray bullets in terms of the physical layout of the condominium complex, in terms of not knowing who else is [p. 17] there, and in terms of the nature of the offenses for which the search warrant was issued, narcotics and firearms. I mean, there was probable cause to believe that there was going to be evidence of those violations found which are inherently dangerous.

Based on that, they need the defendant's assistance in getting the situation under control, his controlled assistance. And so they stop him under *Michigan* versus *Summers*, take him back to the house, and at the same time that they are stopping him, they do the protective sweep of the car. Find the clip. And at that point under *Ross*, there is probable cause to search the entire car and the contents.

But even apart from all that, if the defendant had not even been there, just two days previously when Officer Biernacki corroborated information supplied by the informants which led to the issuance of search warrants for Aspen Ridge, for Avon Street, the residence of George Reid, and for a party store that the defendant allegedly operated, the agents, at the very least, had probable cause under 21 USC 881(b)(4) to conduct the warrantless seizure of that car, which has not been challenged, which they gave the defendant notice for, which they did not need any exigency and no timing requirement on that under the statute, as set forth in *United States* versus *Kemp*, and the other cases cited in the Government's brief.

[p. 18] So we have a proper inventory search flowing from that and based on all of those theories, Your Honor, the Government vigorously argues that the evidence in this case should not be suppressed and that the defendant's motion should be denied.

THE COURT. Mr. Pitts.

MR. PITTS: May it please the Court. Let me begin by saying that I'm not too sure that our analysis is basically the same, or our perspectives are the same. Let me further digress by indicating that from the very onset, this country – and I'm going to try to be as brief as I can.

This country has a problem. It has a problem particularly with reference to the deluge of narcotics that are coming into our society and destroying us. I don't think there is any problem about that. And I think closely related to that, it was brought out by the testimony of the officers, the guns, and the deaths, and et cetera. However, in trying to resolve that problem, the question is: How are

we going to do that without destroying the basic fundamentals of this society, namely the Bill of Rights.

And I think it is recognized that, indeed, the Fourth Amendment is slowly on the way of being destroyed, or at least being change radically.

The First Amendment, we have problems with that. It seems like we are having problems with the Sixth Amendment, [p. 19] with deference to lawyers and their attorneys fee, and et cetera.

What I'm suggesting to the Court is that one subject matter is having a devastating effect upon our method of living. It seems when Europe is opening up, as one of the writers have said, the United States is somewhat constricting itself, to a certain extent.

This is a classic example, I think for this Honorable Court to demonstrate and to show that, indeed, we aren't just going to allow that because of the threat of narcotics. I'm not too sure that *Summers* applies. I'm not too sure that *Long* has any application or *Ross*, or all these other cases. This is elementary. This is a basic case as to whether or not there is probable cause. That is what it boils down to, whether or not there was probable cause to take that particular vehicle.

And I think the Court, in its inquiry of my adversary, I think was – maybe I misread him – leaning in that direction, trying to ascertain what was the justification from a legal point of view authorizing the police department, or the DEA to take that vehicle.

THE COURT: You say "take it." There may be –

MR. PITTS: Seize it.

THE COURT: Well, as I perceive the Government's argument, there are two different arguments. The one is the [p. 20] search that followed the discovery of the clip.

MR. PITTS: Okay.

THE COURT: Whether or not it was actually seized. And the second being the seizure and subsequent purported inventory search.

MR. PITTS: Let me take them in that order, inverse order, if you please.

The seizure aspect. Is it 81(b) – which allows the seizure of those instruments and those particular vehicles which may be used in the transporting of contraband and et cetera. It is probable cause. That section – may I see it again – Section (b), (b)(4), Judge, indicates – well, actually it is (b)(3), but it has a (b)(1) and (2), but (b)(3) says the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to the health, and safety or that the Attorney General has probable cause. Probable cause is the key.

Now, the question is whether or not there was probable cause and that is where, I think, your judgment comes in in ascertaining and trying to assess and evaluate what was the basis of, indeed, the probable cause, if it is that, or if it is not something like some kind of suspicion.

THE COURT: Is it not, as the Government argues, the same "probable cause" that the magistrate concluded? In other words, isn't it the exact same knowledge and information that [p. 21] led the magistrate to conclude that there was probable cause to issue the

search warrant of the house, that is, the movement of this brown rectangular package?

MR. PITTS: Sure.

THE COURT: Isn't that the – which moved in and out of the car?

MR. PITTS: Sure.

THE COURT: Isn't that the same information that – at least purportedly or arguably – led the agent to say that this, there are narcotics, the police officer to say there are narcotics in the house and the magistrate to believe probable cause, and the DEA agent to say that contraband or narcotics was, was used in the car, or rather the car was used in conjunction with it?

MR. PITTS: It may be. It may be. But who did it go to in order to make that objective finding? It went to a magistrate. It went to a magistrate because, why? You are going to violate somebody's fundamental right to privacy. And then you are going to leave it to the officer to say himself, that, listen, for the house I'm going to do that, but for the car I'm not. Because I just made that independent decision two days ago and based upon my observations and my experience, that bag which may contain 20,000 dollars, that bag which may contain gold dust, that bag which may contain some rags that were used in an arson someplace, that bag which may and may [p. 22] and may and may, and, in fact, the fact of the matter is, that they didn't bust the house where the alleged bag was taken to, where a kilo of alleged narcotics was transferred to, if, in fact, it did exist.

They didn't, if, in fact, they did get a search warrant, you heard the testimony from the officer indicating that, listen, "We didn't execute a search warrant at that house until sometime within the last fifty or sixty days." That is June, April and May. Not February, when the alleged transfer took place. That is if, in fact, it did exist. That raises a serious question as to whether or not, indeed, they are, indeed, being credible, as well as being truthful.

You don't think these police officers, in the course of their investigation, are going to let that type of narcotics get away? The probable cause is the crux.

He may be the worse man in the world, but he is still entitled to go to that airport and get on that airplane. He is still entitled to transfer himself around in this community and society, with stares there may be, with all types of innuendos [sic] and et cetera that may exist. But the fact of the matter is, he has his freedom until and unless there is some probable cause.

And the question is whether or not just by making that observation of some material, which supposedly might have satisfied a magistrate, but wasn't presented to the magistrate [p. 23] as it relates to the alleged seizure, they made that decision. They may be wrong and dead wrong.

And I submit to you that the after the fact, when she has made an issue, the Assistant U.S. Attorney has, well, listen, he hasn't complained about it. Well, how can they say that he hasn't complained about it when they didn't follow through on the alleged narcotics if it did exist. A kilo. You aren't talking about some ounces or some grams. You are talking about 20,000 dollars worth of

narcotics that may be 100,000 dollars or 200,000 or 300,000 dollars out there destroying our community.

They didn't get a search warrant. They didn't cover that house. They didn't do anything to effectuate the seizure of that alleged narcotics or those that were allegedly involved in it, if, in fact, they did, and if they were. What is the probable cause?

And I'm suggesting that there is a serious question as to whether or not they were narcotics. Certainly, it wasn't given to a third party to determine whether or not it was. And we are not going to allow our Government – I assume that we aren't – just to make, let police officers make those decisions when they are going to deprive us of our property. Because if they can do it in that instance, they can do it for other people.

Just like when they do it at the airport. Stopping [p. 24] people coming in for a profile. Our country is constricting itself, because eventually they are going to stop the wrong person and perhaps a number of other people. And all of the guys are trying to get some narcotics. And we know they don't hit all the time.

We know also that when you speak you aren't necessarily doing anything to inflame society and the public. But the fact of the matter is that somebody can make an issue out of that. So we leave it to a Judge to decide.

What I'm suggesting, Your Honor, is that – and then let me just make a little distinction with reference to *Summers*. She wanted to say that it applies. If you read *Summers* you will notice that the man was stopped on the

stairs, on the steps. He was stopped and then brought back into the house.

This man is not only in a car, he is on the common driveway leading out of the complex. So it has to fall back upon whether or not there was some probable cause to stop him. And it certainly not a *Terry* type of stop when the police comes up to the car with guns drawn. Listen, that man is under arrest. He is under arrest.

If he is not under arrest, then what kind of protective sweep do you need at that particular point when he is taken out and immediately handcuffed? That car, indeed, at that particular point, we get on to the point with reference [p. 25] to opening up and then taking out the alleged contraband, or the silencer. Listen, the car, indeed, is in their controlled authority at that particular point.

Now, they might go in and seize that particular car as incidental to that particular arrest. But I think that they, in that particular point can also get a search warrant to search that particular vehicle as there is no threat whatsoever to their safety and et cetera.

There is no threat to it, importantly, because the man drives the car back to the house after he has gone through it.

Let me suggest, Your Honor, that I'm not too sure that, indeed, overall this particular society is going to be able to and manage to salvage itself the way it was ten years ago before the dope problem. But I suggest and humbly submit to this Honorable Court, if it does, it is going to have to be because the magistrates and judicial

officers like you sitting in on hard cases that make for tough law. That may not please everybody, but certainly please those of us who have been, indeed, schooled in the theory and the philosophy behind the law.

And I humbly submit to you that this is a classic instance where there was no probable cause, no justification whatsoever for the seizure of that particular vehicle under the guise of, indeed, a seizure.

[p. 26] I humbly submit to you as the results of that, suppression is not only the proper thing, but it may very well be considering the officer's testimony and what transpired and what has failed to transpire in view of their conduct, rather lapsed thinking.

Thank you.

THE COURT: Any further response?

MS. HARTMANN: Just quickly, Your Honor.

This case is not about probable cause. In *Hardnett*, that was the situation where it was a stop and the 6th Circuit specifically stated that when our officers have articulable basis for believing that the individual is potentially dangerous that they can bring out their weapons, they can control the situation while they are conducting a *Terry* stop. No probable cause is necessary. And it is not an arrest.

Michigan/Summers was not about probable cause. In fact, in *Michigan* versus *Summers*, it didn't matter whether the officers had any reason to believe that the individual was dangerous or was involved in any criminal activity whatsoever. It was a, it is a preventative measure based

on the potential danger that can arise when agents go out to execute a search warrant.

The same thing with *Michigan* versus *Long*. A protective search of the car is proper under Supreme Court law without probable cause when there is a basis for believing [p. 27] that the individual might be armed or potentially dangerous.

In this case, while it is not necessary, it is important in terms of analysis that the agent did not seize the car making an out-of-the-blue, on-the-field decision. It was only after a magistrate had signed a warrant to search his premises, and there was a search warrant issued for Avon Street, George Reid's premises, all based on that same information that the Court, that has been presented to the Court.

And based on all of that, the Government strenuously seeks and requests denial of defendant's motion.

MR. PITTS: I don't want to be overbearing, Judge, with your permission, let me just simply say that it is dangerous to take these things out of perspective.

Notice the Assistant U.S. Attorney now comes back with *Hardnett*. But look, if you look at *Hardnett*, like you looked at *Summers*, you will notice that the probable cause was what? It was a radio call.

At the suppression hearing in Detroit, the police officer – and this is Judge Taylor's case – testified that on December 29th, he and his partner, Joseph Shaw received a call. It is not just observation. They received a call from Officers Lawrence Wideman and Harry Romolino that

there were "men armed with guns in front of 1251 Meadowbrook in a burgundy Pontiac." What more do you need?

[p. 28] It is the wolf situation. You have got some probable cause. You get something that you are relying upon. The police officers, they made an observation, or something with reference to the dangerous situation.

We don't know what is in that bag. That is the danger. That is the danger if we are going to allow that snow, if I could use the vernacular, that's what it is called sometimes. It is destroying us. And I humbly submit to you that this is a classic example, a classic case where, indeed, the Government is hard put to explain the conduct of these law enforcement officers and it is just their camouflage.

And I would submit to you that suppression is a remedy.

THE COURT: All right. The Court is going to take the matter under advisement. I note that we have trial to commence Monday morning. I will notify counsel on Friday of the Court's decision.

* * *

[p. 5] Pre-Trial Transcripts – June 29, 1990

I have to accept Ms. Hartmann's statement, as an officer of the Court that when she indicated she had no further testimony, that she honestly believed it, being unaware of what she understands is additional testimony.

I also have to assume that Ms. Hartmann believes that this additional testimony is of some significance. Certainly we shouldn't be taking additional testimony which would either be repetitive or irrelevant to the issues to be decided.

I think therefore, under the circumstances that the best interest of justice would be served by allowing the government to present this additional testimony with, of course, defense counsel having the opportunity to probe such offered testimony in the manner that defense counsel deems appropriate.

Now, having ruled that I will allow this additional "testimony," what is your suggested method of presenting this information for the Court's consideration, Ms. Hartmann?

MS. HARTMANN: Your Honor, the agent, Thomas Brandon is present in the courtroom and we will be prepared to put him on the stand and ask him a very brief set of questions. Basically, to elicit the information in the statement that is attached to the government's supplement.

[p. 14] Pre-Trial Motion Transcripts – June 29, 1990

* * *

any additional testimony of any other witnesses, believing that the government had ample opportunity to present the witnesses, that the government should have known what witnesses had important information and

that since the government didn't call them at the hearing when it did take place, the government should be precluded from offering any additional testimony.

Over your attorney's objection, I have indicated that I think that the best interest of justice would be served by allowing the government to put this witness on the stand and, of course, giving Mr. Pitts the opportunity to cross examine that witness.

Does that capsulize accurately, Mr. Pitts?

MR. PITTS: I think it does, Judge.

THE COURT: Okay, please call your witness.

MR. HARTMANN: Your Honor, the government calls Special Agent Thomas E. Brandon.

****OMISSION****

(TESTIMONY OF WITNESS BRANDON
PREVIOUSLY TRANSCRIBED)

* * *

THE COURT: That concludes the hearing, I take it?

MS. HARTMANN: Yes, Your Honor.

THE COURT: From your standpoint, does it conclude the hearing, Mr. Pitts?

MR. PITTS: Yes, Judge, it concludes the hearing. I would just like to add something in argument now as relates to [p. 15] that.

THE COURT: Absolutely.

MR. PITTS: Go ahead. I yield.

MS. HARTMANN: Your Honor, the government would rest on its previous argument but also would just underscore the reasonableness of the officer's actions in terms of, first of all, the stop pursuant to *Michigan* versus *Summers,* in terms of that is when they first saw him coming out of the residence.

I don't think I need to go into that again. But at the time that they did stop him, pursuant to *Michigan* versus *Long,* they are entitled to do a quick search like a *Terry* frisk of a car, if there is a reasonable and articulable basis that the defendant may be potentially dangerous.

And based on the fact of what they knew, the informant who had said that he always carries a weapon with him, their knowledge of his prior arrests and convictions for CCW, carrying a concealed weapon, that has come out from all of the witnesses, as well as the defendant's own actions when the two agents are first approaching the vehicle, his right are moving quickly. And after Agent Brandon's testimony that all he did was go right in and check that area and those areas immediately accessible to the defendant, while the defendant was still half in and half out of the car.

That for all those reasons, as to that theory of the defendant's, the agents' actions were reasonable and the [p. 16] evidence should not be suppressed.

And I don't think I need to go into the other theories, that that has all been placed on the record.

MR. PITTS: Fortunately, we aren't someplace else where we have a Jury, but I am going to apply it

anyway. I think it was Sir Walter Scott who made that famous line that we often use, "Oh, what a tangled web we weave when first we practice to deceive."

Think about the testimony, if the Court please, as yesterday, that indicated where the car was allegedly seen when it first came out of the house. It came from out of the garage. This man saw it, he saw the car parked there when he drove by. Where could he see it parked but outside of the garage? That's number one, the tangled web would seem to indicate.

Number two, this just happens to be brought to our attention today, although he has seen this fellow, the officer who is in charge of the case, for four days. That's number two.

It would seem to me that number three, which gets to the heart of the matter, really shows a web of deception. "What was the basis of your stopping the vehicle?" Well, it later develops in response to the question, the agent in charge or the person who is responsible for that particular raid, a Sergeant Culver, I think, or an Agent Culver, has told [p. 17] us, in light of the defendant's background, et cetera, the easiest thing to do is to wait until he gets out of the house. And then when he gets out of the house, we can effectuate a stopping of him.

That was followed up with a question that I normally don't ask, but I wanted to have no opportunity, or somebody to come back later on and say nothing about it, whether or not there was anything that he might have forgotten or could add. And I asked him, "Is that all that was told to you?" He said, "Yes."

Everybody else was under the impression, who was here yesterday – and obviously, they didn't talk amongst each other, but we know that common sense tells us and human nature indicates that, listen, you are going to confer. Listen, we stopped the car because we were going to seize it. The word "seizure" never same out of that man's mouth. And he is part and parcel of the entire raiding crew.

He got it straight from the lips of the officer in charge. Why are we going to stop the man after he gets out of the house? Something's wrong. Something is rotten in these proceedings as well as Denmark.

He's bad. It may very well be, Judge. This is bad too. And I think this particular type of testimony highlights what we were talking about yesterday in our closing. Get him, Judge, but get him right. I think that is what the system is [p. 18] all about and that is all that I ask. Be right.

MS. HARTMANN: Your Honor, there is no web of deception here. It has been no secret that when they went to execute that search warrant, that it was agreed upon by everybody because of the defendant's background, because of the layout of the condominium complex, because of the Doberman Pinscher, that they were going to wait until the defendant came outside of the residence, because they did not know.

And the fact that there was earlier surveillance, maybe by this agent, of a car in a driveway behind the complex is really irrelevant because he even testified which is consistent with the other testimony, that the first

time anybody saw him, before the stop, was as he was driving out of the condominium.

There is no inconsistency there. That is the first time they saw him.

And in terms of executing the search warrant, under *Michigan* versus *Summers,* that stop was totally reasonable. The fact that the ATF agents did not know what the DEA agents were going to do in terms of forfeiture, does not mean there is some kind of deception going on. It is a DEA procedure. It is an administrative forfeiture proceedings which is completed now, that Agent Crock, who testified about his practice and procedure in bringing out notices of forfeiture, what that was.

[p. 19] And the fact that this ATF agent who was on surveillance didn't know about the forfeiture – maybe he did and maybe he didn't, he wasn't asked that question – has nothing to do with the legitimacy of that forfeiture seizure. That was a DEA procedure, not an ATF procedure. The supervisor of the ATF people out there, Jim Culver, whether, you know, he made the statements about the potential danger and they had made the decision to do a *Michigan* versus *Summers* type of stop, the way they did it, that is consistent with everybody's testimony.

There is no deception here, there has been no secret at any time about what prompted that decision to be made.

And, for all those reasons, Your Honor, the government requests that the Court deny the defendant's motion.

THE COURT: Anything further, Mr. Pitts?

MR. PITTS: No.

THE COURT: The Court is going to take the matter under advisement in view of the fact that the trial of this case will not start until first thing Monday morning.

We will begin Monday morning with the March 29th incident. I ask that counsel be prepared to go all day on Monday and Tuesday, if, in fact, that is necessary.

[p. 2-125] (Brief pause)

THE COURT: The Court will now give its opinion on the defendant's motion to suppress the evidence which resulted from the search of February 23, 1990. This motion, of course, relates to the other three counts which the Court severed from the Count which we have just conducted the trial on.

With regard to the search of February 23rd, 1990, the testimony of, I believe it was Officer Biernacki, indicated that they went to the residence on Aspen Ridge to participate in the execution of a search warrant. He observed the defendant leave the premises in the Volvo. A decision was made to allow the defendant to get a short distance away from the house, before he was stopped.

That decision was made because they believed they needed the assistance of the defendant, or could use the assistance of the defendant, in conjunction with the search, particularly because there was a Doberman Pinscher in the house and the police felt it might be more

orderly and it might avoid a confrontation between the officers and the dog, possibly resulting in injury to either one.

So they determined that it would be better to stop the defendant's vehicle and, at least, request his assistance in entering the house.

The agents did, in fact, stop the defendant, a short distance from the house, and he was ordered out of the car.

[p. 2-126] Agent Brandon testified that he came up behind the Volvo and went to the passenger side. Officer Schmidt went to the driver's side. Office Schmidt ordered the defendant to get out of the car. At that point, Officer Brandon testified that he saw the defendant's right arm moving quickly.

He testified that the defendant's arm was moving quickly and simultaneously as Officer Schmidt was pulling him out of the vehicle, at least as observed by Officer Brandon. Officer Brandon further testified that the movements of the defendant's arm led Officer Brandon to conclude that the defendant was reaching for a gun.

At that point, Officer Brandon testified that he reached in, opened the glove compartment, and found a nine millimeter clip. Officer Brandon was aware that the defendant had a conviction for CCW, as I recall. That the defendant was not, in Officer's Brandon's opinion, directly complying with Officer Schmidt's order to exit.

Officer Brandon testified that he was alarmed and that the defendant was not completely out of the vehicle

when Officer Brandon reached in to the glove compartment.

The court believes that the officers had justification for making an investigatory stop of the defendant, pursuant to *Terry v. Ohio*, and for requesting the defendant's assistance in entering the house pursuant to *Michigan v. Summers*, 452 US 692.

[p. 2-127] It was not unreasonable for the police who were about to enter the home in which a dog was present to require or request the owner's assistance. This could avoid a confrontation between the police officers and the dog and avoid possible injury to the officer and/or dog.

It also eliminated possibly the need for the officers to make a forced entry into the house, assuming the owner had with him a key and was willing to open the premises with a key.

In conjunction with this conduct, that is, requesting the defendant to stop, exit the car and assist the officers in entering the home, it was reasonable for the officers to ask the defendant to exit the vehicle and, in fact, to conduct a pat down search of the defendant.

There was also testimony that the Government, through the DEA, would have seized the vehicle under the forfeiture statute even if the defendant had not been in the car. Also, Agent Crock testified that a decision was made before the officers went to the house.

The decision was made to seize the vehicle and that decision was based on information the DEA agents had received relating to the incident of February 21st, when the defendant was observed by officers at the Aspen

Ridge premises when he was allegedly observed taking a package from under his coat and placing it into the trunk of the Volvo.

The officer who made the observations testified that [p. 2-128] in his experience, the package that was taken from the coat and placed in the Volvo resembled in size and shape, the color and packaging of that which usually contains a kilo of cocaine. The vehicle was followed to, as I recall, to an address on Avon, the residence of a George Reid, where the defendant removed the package from the trunk and took it to the Avon address.

Therefore, the DEA, based on that, believed they had probable cause to seize the vehicle since the vehicle was used in the trafficking, or allegedly in the trafficking of narcotics or in conjunction with a narcotics transaction.

The Government contends that the search was lawful essentially on two grounds.

First, the Government contends that the officers were justified in requesting the defendant to exit the car on the basis of *Terry v. Ohio*, and for the purpose of assisting the officers in entering the home. As a result of Officer Brandon's observations, he discovered a nine millimeter clip in the unlocked glove compartment. According to the Government, this constitutes probable cause that the defendant had committed a felony since the police knew that he was a convicted felon and under the statute, he may not possess a weapon or ammunition.

Since probable cause existed, the Government contends the police officers had the right to do a complete search of [p. 2-129] the vehicle.

Secondly, the Government contends that the weapons which the Government seeks to introduce, were recovered as the result of an inventory search pursuant to the forfeiture seizure and, therefore, were not the result of an illegal search and seizure.

Having determined that the police officers had the lawful right to stop the vehicle, in this Court's opinion, the officers had the right to ask the defendant to exit the vehicle. Upon being ordered out of the vehicle, Officer Brandon observed the defendant moving his arm quickly. This Court concludes that Officer Brandon was aware of the defendant's past history and that Officer Brandon believed that the defendant may be reaching for a weapon.

At that point, Officer Brandon, his immediate reaction was to reach in to the unlocked glove compartment. Such conduct, on the part of Officer Brandon, in this Court's opinion, was reasonable. Under the circumstances, Officer Brandon had not only the right, but to a duty to take appropriate steps for the safety of himself and the safety of his fellow officers.

Such conduct appropriately included reaching into the glove compartment where the defendant had been observed moving his arm in a particular manner. Defendant had been ordered out of his car. In Brandon's opinion, he was not [p. 2-130] strictly complying with the request. Such conduct, in this Court's opinion, justified the concern of Officer Brandon resulting in his action in reaching into the car.

The entry into the unlocked glove compartment was, therefore, not, in this Court's opinion, an unreasonable

search. Such search disclosed the presence of the nine millimeter clip. This fact, with knowledge that the defendant was a convicted felon, gave the police probable cause that a felony had been committed and justified the search of the vehicle for weapons which may be associated with the clip.

Therefore, the search of the vehicle was proper and on this basis, the motion to suppress must be denied.

The search was also justified, in this Court's opinion, as a proper inventory search pursuant to the seizure by the DEA. Agent Crock testified, based on information that he has, that the Volvo had been used in conjunction with a drug transaction and a decision was made to seize the vehicle. This decision, which was pursuant to 21 USC 881, was made prior to the DEA agents going out the Aspen Ridge property on February 23rd.

21 USC 881(B)(4) provides that a seizure of property used in conjunction with a narcotics transaction, that the property may be seized without process, that is, without first obtaining a search warrant when the Attorney General or as designated in this case, the DEA agent, has probable cause to [p. 2-131] believe that the property is subject to civil forfeiture.

Agent Crock made this determination based on the information he possessed relating to the February 21st incident that, in fact, the vehicle had been used in conjunction with a drug transaction. Therefore, Agent Crock had justification, that is, probable cause, for seizing the vehicle.

He testified that pursuant to such authority, he did, in fact, seize the vehicle and a notice of seizure was given to the defendant.

Based on the information that Agent Crock possessed, relating to the February 21st incident, this Court believes that Agent Crock did have sufficient probable cause to believe the vehicle had been used in conjunction with an illegal drug transaction.

This Court finds that the seizure was legally permissible pursuant to 21 USC Section 881. This Court having determined that the seizure pursuant to Section 881 was appropriate, therefore, an inventory search of such vehicle is permissible. Such permissible inventory search resulted in the discovery of the evidence, which the defendant now seeks to suppress. The motion to suppress must be denied on this basis as well.

For the reasons indicated, the defendant's motion to suppress is denied.

THE COURT: Miss Hartmann.

MS. HARTMANN: Your Honor, under the Rule 11, I agreed not to take a position.

However, in terms of factual background, I would just like to clarify a few things from the Government's perspective. And that is, my recollection of the suppression hearing testimony was that the defendant did not stop when the agents approached the car. That was Agent Brandon's testimony. That he did not comply with their

orders and that the way they got into the house was the defendant had no choice, but the agents were able to basically force him to open the door with his key. And I would like to make those points clear in terms of the factual record.

MR. PITTS: We just differ. That is all, Judge.

(2)

No. 91-916

In the Supreme Court of the United States

OCTOBER TERM, 1991

STEVEN FLETCHER COCHRAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the stop of petitioner's car and the subsequent seizure of an ammunition clip and a firearm from it violated the Fourth Amendment.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 939 F.2d 337.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1991. A petition for rehearing was denied on September 6, 1991. Pet. App. 11-12. The petition for a writ of certiorari was filed on December 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a plea of guilty in the United States District Court for the Eastern District of Michigan, petitioner was convicted of possessing an unregistered

firearm not identified by its serial number, in violation of 26 U.S.C. 5861(d). Following a jury trial in the same court, he was convicted of interstate transportation of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced to concurrent terms of 52 months' imprisonment. The court of appeals affirmed. Pet. App. 1-10.

1. On February 21, 1990, after receiving information that petitioner was a drug dealer, law enforcement agents began surveillance of his residence. The agents observed petitioner take a thickly packaged rectangular box from his coat, place it in the trunk of his car, and drive to the residence of George Reid. The agents, who were experienced investigators, believed that petitioner's box contained drugs, because kilogram quantities of cocaine are frequently transported in packages of that style and shape. The agents also knew that petitioner had numerous arrests for carrying weapons in his car, including one incident in which Reid was a passenger. Pet. App. 19-32.

Based on their observations, the agents obtained a search warrant for petitioner's residence and began administrative forfeiture proceedings against petitioner's car. On February 23, 1990, the agents arrived at petitioner's residence to execute the search warrant. To promote a safe and orderly search, the agents decided to seek petitioner's assistance in executing the warrant. They knew that he carried arms and kept a guard dog on the premises. Before the agents approached the house, however, petitioner drove away from the premises in his car. Pet. App. 2, 33-34.

Two agents stopped petitioner's car and ordered him to step outside. Petitioner quickly moved his right arm, causing the agent on the driver's side to

open the car door and repeat his order for petitioner to exit. When petitioner continued his motion, the agent pulled petitioner out of the car, while the other agent opened the car's glove box, causing a loaded ammunition clip to fall out. The agents knew that petitioner, as a convicted felon, was not entitled to possess a firearm or ammunition. The agents arrested petitioner and later searched the car and seized an unregistered machine gun from the trunk. Petitioner filed a pretrial motion to suppress the evidence seized from his car. The district court denied the motion. Pet. App. 2-3, 34-36, 76-79, 100-102, 155-161.

2. The court of appeals affirmed petitioner's conviction, rejecting his contention that the evidence seized from his car should have been suppressed. The court concluded that under *Michigan* v. *Summers*, 452 U.S. 692 (1981), the agents properly stopped petitioner, after he departed from his residence, to seek his assistance in executing the warrant. The court rejected petitioner's argument that the agents manipulated the circumstances to permit them to search petitioner's car. Pet. App. 3-5. The majority also concluded that the search of the glove box in petitioner's car was justified by the agents' concern for their own safety, which was precipitated by petitioner's threatening arm movement, and that the discovery of the ammunition clip gave the agents probable cause to search the car and to seize the clip and the firearm. *Id.* at 6.

Judge Wellford dissented. In his view, the decision in *Michigan* v. *Summers* did not permit law enforcement agents to detain petitioner once he was away from his residence or to return him to the premises to assist in executing the search warrant. Pet. App. 8-10.

ARGUMENT

Petitioner contends (Pet. 12-21) that the government violated the Fourth Amendment by stopping his car and subsequently seizing a machine gun and ammunition clip from it. In particular, he maintains that the court of appeals misapplied *Michigan* v. *Summers*, 452 U.S. 692 (1981), because the right of law enforcement agents armed with a search warrant for a residence to restrain an occupant from leaving the premises does not extend to detaining a person who has already driven away. See Pet. 15-17. There is no need to reach that issue, however, because the law enforcement agents had probable cause—or at least reasonable suspicion—to stop petitioner while he was in his car, based on the information supporting the search warrant. Furthermore, even if there is a question under *Summers* whether the agents could force petitioner to return to his residence, they certainly were entitled, at the least, to stop petitioner to request his assistance in executing the warrant. Thus, petitioner was lawfully stopped, and his subsequent threatening motion justified the search of his car.

1. Law enforcement agents can arrest a suspect for a felony in a public place without a warrant if they have probable cause to believe that the suspect has committed a crime. *United States* v. *Watson*, 423 U.S. 411 (1976). Probable cause exists when the facts and circumstances within the arresting officers' knowledge are sufficient for a reasonable person to believe that the suspect has committed or is committing a crime. *Brinegar* v. *United States*, 338 U.S. 160, 175-176 (1949). Here, the law enforcement agents were entitled to stop petitioner's car because they had probable cause, based on the information justifying the search warrant, to believe that peti-

tioner was engaged in drug trafficking. Because the agents had probable cause to arrest petitioner, they were entitled to open petitioner's glove compartment as a search incident to arrest to prevent him from reaching for a weapon. *New York* v. *Belton*, 453 U.S. 454 (1981). And upon discovery of the ammunition clip, the agents were entitled to search the trunk and seize the machine gun. *United States* v. *Ross*, 456 U.S. 798 (1982).

2. Even if the agents' information did not establish probable cause to arrest petitioner, it gave them reasonable suspicion to stop petitioner's car for further investigation. See, *e.g.*, *United States* v. *Sharpe*, 470 U.S. 675, 682-688 (1985). Alternatively, the agents were entitled, under the Fourth Amendment's standard of reasonableness, to stop petitioner to request his assistance in executing the search warrant. See, *e.g.*, *id.* at 682 ("we examine 'whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place' ").

Under either rationale, when petitioner—a person who was known to have an affinity for firearms—moved his arm suddenly upon hearing the agents' command, the agents properly concluded that petitioner was armed and dangerous. See, *e.g.*, *United States* v. *Paulino*, 850 F.2d 93, 97 (2d Cir. 1988), cert. denied, 490 U.S. 1052 (1989); *United States* v. *Williams*, 822 F.2d 1174, 1180 n.62 (D.C. Cir. 1987). To prevent petitioner from drawing a firearm, the agents properly restrained petitioner and opened the car's glove box. *Michigan* v. *Long*, 463 U.S. 1032 (1983). And after the agents discovered the ammunition clip, they had probable cause to search the rest of petitioner's car and to seize the

machine gun. See *United States* v. *Ross*, *supra*. Thus, the government's search of petitioner's automobile was lawful under the Fourth Amendment, irrespective of whether this Court's decision in *Summers* would have allowed the government to return petitioner to his residence while the search was conducted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1992

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